SUPREME COURT, U. S.

FILED

JAN 26

MICHAEL RODAK, JR.

APPENDIX

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-629

ROBERT J. KOSYDAR, Tax Commissioner of Ohio, *Petitioner*,

v.

NATIONAL CASH REGISTER COMPANY, *Respondent*.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

Petition for Certiorari Filed October 10, 1973

Certiorari Granted December 17, 1973

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-629

ROBERT J. KOSYDAR, Tax Commissioner of Ohio, *Petitioner*,

v.

NATIONAL CASH REGISTER COMPANY, *Respondent*.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

INDEX

	Page
Entry of the Supreme Court of Ohio Denying Rehearing, September 6, 1973	1
Entry of the Supreme Court of Ohio Reversing in Part and Affirming in Part the Decision of the Ohio Board of Tax Appeals, July 11, 1973	2
1968 Ohio Intercounty Corporation Return of Taxable Property of Taxpayer, Filed June 25, 1968	3
1968 Ohio Balance Sheet as of December 31, 1967, of Taxpayer, Filed June 25, 1968	40
Workpapers of Tax Agent of the Tax Commissioner of Ohio	44
1968 Intercounty Corporation Correction Notice Issued by the Tax Commissioner, October 28, 1970	46
1968 Final Assessment Certificate of Valuation Issued by the Tax Commissioner, January 29, 1971	47
Notice of Appeal Filed by Taxpayer with Ohio Board of Tax Appeals, February 23, 1971	48
Record of Testimony of Hearing Conducted by the Ohio Board of Tax Appeals, August 5, 1971	50
Three of Taxpayer's Photographic Exhibits Submitted to the Ohio Board of Tax Appeals, August 5, 1971	117, 118, 119
Opinion and Entry of Ohio Board of Tax Appeals, May 25, 1972	120
Opinion of the Supreme Court of Ohio, July 11, 1973	128

THE SUPREME COURT OF THE STATE OF OHIO

NATIONAL CASH REGISTER CO.,
Appellant,

vs.

ROBERT J. KOSYDAR, TAX COMMR.,
Appellee.

No. 72-479

REHEARING

It is ordered by the court that rehearing in this case is denied.

I, THOMAS L. STARTZMAN, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No. _____ Page _____

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 6th day of September, 1973

THOMAS L. STARTZMAN, Clerk.

By _____ Deputy.

THE SUPREME COURT OF THE STATE OF OHIO

NATIONAL CASH REGISTER CO.,
Appellant,

vs.

ROBERT J. KOSYDAR, TAX COMMR.,
Appellee.

No. 72-479

APPEAL FROM THE BOARD OF TAX APPEALS

This cause, here on appeal from the Board of Tax Appeals, was heard in the manner prescribed by law. On consideration thereof, the decision of the Board of Tax Appeals is reversed in part and affirmed in part for the reasons stated in the opinion herein.

It is ordered that an entry issue to the BOARD OF TAX APPEALS to carry this judgment into execution.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this _____ day of _____ 19____

_____Clerk

_____Deputy

TAX FORM No. 946
Prescribed by
The Tax Commissioner

STATE OF OHIO

RECEIVED
OFFICE OF THE TAX COMMISSIONER
CORPORATION TAXES
AUDITS AND ASSESSMENTS UNIT
Date 6-25-68

1968

INTER-COUNTY CORPORATION
RETURN OF TAXABLE PROPERTY

RETURN NO. 6739575 BUSINESS CLASSIFICATION 360

NAME OF CORPORATION (As recorded with the Ohio Secretary of State)	The National Cash Register Company
ADDRESS OF PRINCIPAL ACCOUNTING OFFICE	Main and K Streets TIME LIMIT FOR WAIVER TO 2-8-71
CITY, STATE AND ZIPCODE	Dayton, Ohio 45409
Name of former owner if property was listed by number last year	

STATE OF INCORPORATION	DATE INCORPORATED OR QUALIFIED IN OHIO	OHIO CHARTER NUMBER
Maryland	1926	120783

U. S. CORP. INCOME TAX IDENT. NO.	BUSINESS CODE NUMBER FROM U.S. CORPORATION INCOME TAX RETURN FORM NO. 1120
31-0387920	

THIS RETURN IS TO BE FILED WITH THE TAX COMMISSIONER,
88 EAST GAY STREET, COLUMBUS, OHIO 43215,
BETWEEN FEBRUARY 15 AND APRIL 30, 1968

THE LAW IMPOSES A FIFTY PER CENT PENALTY FOR FAILURE TO FILE A RETURN. IN ADDITION THE LAW IMPOSES A CHARGE OF ONE-HALF OF ONE PER CENT PER MONTH WHEN A RETURN IS DELINQUENT OR PROPERTY HAS BEEN OMITTED.

FILING EXTENSION TO -June 30, 1968 ✓

EXTENSION NUMBER -66

FOR USE OF THE OFFICE OF THE TAX COMMISSIONER—DO NOT WRITE IN SPACE BELOW

CONSOLIDATED RETURN		CLAIM FOR DEDUCTION	9.32	PENALTY ADDTL. CHARGES	% %
Return Check-In	MA	Comptometer Checked		Acceptable As Corrected	
Taxing Districts Verified	MAK	Office Audit		Date	Examiner
Pre-assessment Audit		To Be Field Audited		Acceptable As Filed	
Intangibles Checked	E	Field Audit Completed		Date	Examiner

REMOVE PAGES AT PERFORATIONS. DISCARD UNUSED PAGES. STAPLE PAGES INSIDE COVER FOR FILING.

TRANSCRIPT

1

1968

STATE OF OHIO

TAXPAYER IDENTIFICATION

Form 948
PAGE 1

IF A CONSOLIDATED RETURN IS FILED, A CONSOLIDATING BALANCE SHEET, INCLUDING ALL CONTROLLED SUBSIDIARIES, EXCEPT DEALERS IN INTANGIBLES AND PUBLIC UTILITIES, IS REQUIRED.

NAME OF CORPORATION The National Cash Register Company

This return is made by the above named corporation as holder of fifty-one per cent or more of the common stock of the following:

NAME	ADDRESS	State in which organized	State of organization	Number shares of Outstanding Common Stock	Number owned by reporting corporation
	Schedule Attached				

This corporation or (if this is a Consolidated Return) one or more of its subsidiaries held at fiscal date personal property in the following counties in Ohio:

	COUNTY	TAXING DISTRICT
1.		
2.		
3.	See Recapitulation	
4.		
5.		
6.		
7.		
8.		
9.		
10.		
11.		
12.		

Sufficient description of business operations in each county and taxing district is necessary for classification and use of proper tangible property schedule, especially when manufacturing classification is claimed.

Description of business and Name under which business conducted in each location

Form 945 Manufacturer and Retailer of Business Machines and Supplies

TRANSCRIPT

VOLUME OF BUSINESS

This information is to be furnished, in conformity with the Ohio Franchise Tax requirements, even though not disclosed in the Franchise Tax Report. Figures must cover the twelve-month period preceding Balance Sheet date.

Amount of Ohio business	$ 31,597,972
Entire amount of business done	$ 630,299,530

1968

Form 948
PAGE 3

SCHEDULE 1

STATE OF OHIO

DOMESTIC ANIMALS—AGRICULTURAL PRODUCTS

COUNTY	TOWN DISTRICT	SEED OF ANNUALS				SEED OF PERENNIALS			

1968

STATE OF OHIO

SCHEDULE 2

Form 945
PAGE 3

MACHINERY AND EQUIPMENT

List all property of the following kinds owned and used in business in this state on taxing day:

List of DPE engines, machinery, tools and implements used in Mining and Manufacturing, Mining, Logging and Dry Cleaning Plants, Mining and Lime Supply Plants, Stone and Gravel Plants, Sales and Distribution Rental catalog.

Also list owned items for equipment mentioned herein, if value of equipment is not included in value of machinery, which value of equipment, description of property, that is, must justify manufacturing classification, Use of Property, Type of Property, Subsequently to each taxing district.

COUNTY	TAXING DISTRICT	DESCRIPTION OF PROPERTY	YEAR ACQUIRED	LIFETIME (YRS.)	LISTED VALUE, (Before adding 6%)
Montgomery	Canton Twp. - 6117	Machinery & Equipment - Owned	67	20	3,316 800
"	"	" - Owned	67	20	
"	Canton Twp.	" - Owned	67	20	279 160
"	"	" - Leased	67	20	
Dayton	Union Township	Printing and Binding Equipment	67	20	3,060 700
Dayton	Union Township	Machinery and Equipment	67	20	
Montgomery	Miami Township	Mail Equipment	67	20	2 210
"	Dayton	Conveyors and Fixtures 6117	1968	20	
"	"	Powerhouse Equipment	67	20	
"	"	Engineering and Research Equipment	67	20	
"	"	Foundry Machinery and Equipment	67	20	
"	"	Printing and Bindery Equipment	67	20	
"	"	Machinery and Equipment - Other	67	20	16 338 190
"	"	Tools	67	20	
		Total Manufacturing Machinery and Equipment			19 043 300

TRANSCRIPT

The National Cash Register Company
Sound Value Schedule - Machinery & Equipment (Leased)
Guernsey County - Cambridge City
December 31, 1967

Year Acquired	Balance 12-31-66	Additions	Deductions	Balance 12-31-67	Sound Value %	Sound Value Value
1949 & Prior						
1950						
1951						
1952						
1953						
1954						
1955						
1956						
1957						
1958						
1959						
1960						
1961						
1962	$ 96,796		$ 96,796			
1963	110,641			$ 110,641	77.5	$ 85,750
1964	6,818			6,818	82.5	5,620
1965						
1966						
1967						
	$ 214,255		$ 96,796	$ 117,459		$ 91,370

TRANSCRIPT

The National Cash Register Company
Sound Value Schedule - Machinery & Equipment (Owned)
Guernsey County - Cambridge City
December 31, 1967

Year Acquired	Balance 12-31-66	Additions	Deductions	Balance 12-31-67	Sound Value %	Sound Value Value
1949 & Prior						
1950						
1951						
1952						
1953						
1954	$ 59,424.68		$ 59,424.68	$ ——		
1955						
1956	5,710.62			5,710.62	42.5	$ 2,430
1957	2,841.92			2,841.92	47.5	1,350
1958	13,392.79	$ 2,870.14		16,262.93	52.5	8,540
1959	10,860.98			10,860.98	57.5	6,250
1960	30,929.44	28,251.83		59,181.27	62.5	36,990
1961	12,954.11		526.99	12,427.12	67.5	8,390
1962	16,705.30	5,297.81		22,003.11	72.5	15,950
1963	84,525.25	68,017.09		152,542.34	77.5	118,220
1964	11,228.04	2,802.57		14,030.61	82.5	11,580
1965	251,976.75	13,937.67		265,914.42	87.5	232,680
1966	694,003.77	31,255.94		725,259.71	92.5	670,870
1967		1,560,195.15		1,560,195.15	97.5	1,521,190
	$ 1,194,353.65	$ 1,712,628.20	$59,951.67	$2,847,230.18		$ 2,634,440

TRANSCRIPT

The National Cash Register Company
Sound Value Schedule - Machinery & Equipment (Owned)
Guernsey County - Cambridge Township
December 31, 1967

Year Acquired	Balance 12-31-66	Additions	Deductions	Balance 12-31-67	Sound Value %	Sound Value Value
1949 & Prior						
1950						
1951						
1952						
1953						
1954	$ 12,171.32		$ 12,171.32			
1955						
1956	1,169.64			$ 1,169.64	42.5	$ 500
1957	582.08			582.08	47.5	280
1958	2,743.10	$ 587.86		3,330.96	52.5	1,750
1959	2,224.54			2,224.54	57.5	1,280
1960	6,334.94	5,786.53		12,121.47	62.5	7,580
1961	2,653.26		107.94	2,545.32	67.5	1,720
1962	3,421.57	1,085.09		4,506.66	72.5	3,270
1963	17,312.40	13,931.21		31,243.61	77.5	24,210
1964	2,299.72	574.02		2,873.74	82.5	2,370
1965	51,609.70	2,854.70		54,464.40	87.5	47,660
1966	142,145.35	6,401.82		148,547.17	92.5	137,410
1967		319,558.04		319,558.04	97.5	311,570
	$ 244,667.62	$ 350,779.27	$ 12,279.26	$ 583,167.63		$ 539,600

TRANSCRIPT

The National Cash Register Company
Sound Value Schedule - Machinery & Equipment (Leased)
Guernsey County - Cambridge Township
December 31, 1967

Year Acquired	Balance 12-31-66	Additions	Deductions	Balance 12-31-67	Sound Value %	Sound Value Value
1949 & Prior						
1950						
1951						
1952						
1953						
1954						
1955						
1956						
1957						
1958						
1959						
1960						
1961						
1962	$ 19,826		$ 19,826			
1963	22,662			$ 22,662	77.5	$ 17,560
1964	1,397			1,397	82.5	1,150
1965						
1966						
1967						
	$ 43,885		$ 19,826	$ 24,059		$ 18,710

TRANSCRIPT

The National Cash Register Company
Sound Value Schedule - Printing & Bindery Equipment Washington C. H.
December 31, 1967

Year Acquired	Balance 12-31-66	Additions	Deductions	Balance 12-31-67	Sound Value %	Sound Value Value
1954 & Prior	$ 150,836		$ 113,775	$ 37,061	20.00	$ 7,410
1955	170,299		29,302	140,997	22.50	31,720
1956	173,629		29,703	143,926	25.00	35,980
1957	382,280		65,428	316,852	27.50	87,130
1958	244,753		41,745	203,008	30.00	60,900
1959	308,101		52,583	255,518	36.25	92,630
1960	300,897		51,379	249,518	43.75	109,160
1961	141,973		24,084	117,889	51.25	60,420
1962	26,769		4,415	22,354	58.75	13,130
1963	45,790		7,627	38,163	66.25	25,280
1964	57,716		10,035	47,681	73.75	35,160
1965	97,847		16,859	80,988	81.25	65,800
1966	247,939		42,548	205,391	88.75	182,280
1967		$ 58,443		58,443	96.25	56,250
	$ 2,348,829	$ 58,443	$ 489,483	$ 1,917,789		$ 863,250

TRANSCRIPT

The National Cash Register Company
Sound Value Schedule - Washington C. H. - Mfg. Equipment
December 31, 1967

Year Acquired	Balance 12-31-66	Additions	Deductions	Balance 12-31-67	Sound Value %	Sound Value Value
1954	$ 34,640			$ 34,640	32.50	$ 11,260
1955	9,176			9,176	37.50	3,440
1956	23,918			23,918	42.50	10,170
1957	105,679		$ 7,615	98,064	47.50	46,580
1958	359,748			359,748	52.50	188,870
1959	454,846			454,846	57.50	261,540
1960	191,525			191,525	62.50	119,700
1961	50,034			50,034	67.50	33,770
1962	105,233			105,233	72.50	76,290
1963	18,876			18,876	77.50	14,630
1964	153,466			153,466	82.50	126,610
1965	139,280			139,280	87.50	121,870
1966	50,879			50,879	92.50	47,060
1967		$ 201,394		201,394	97.50	196,360
	$ 1,697,300	$ 201,394	$ 7,615	$ 1,891,079		$ 1,258,150

TRANSCRIPT

The National Cash Register Company
Sound Value Schedule - Powerhouse Equipment
December 31, 1967

Year Acquired	Balance 12-31-66	Additions	Deductions	Balance 12-31-67	Sound Value %	Sound Value Value
1949 & Prior	$ 900,466			$ 900,466	20.0	$ 180,090
1950					22.5	
1951					25.0	
1952					27.5	
1953	25,595		$ 25,595		30.0	
1954					32.5	
1955	35,288		29,957	5,331	37.5	2,000
1956	121,719			121,719	42.5	51,730
1957	167,932			167,932	47.5	79,770
1958	176,578			176,578	52.5	92,700
1959	95,215			95,215	57.5	54,750
1960					62.5	
1961	3,679			3,679	67.5	2,480
1962	7,618			7,618	72.5	5,520
1963	26,362			26,362	77.5	20,430
1964	664			664	82.5	550
1965	1,397			1,397	87.5	1,220
1966	57,142			57,142	92.5	52,860
1967		$ 3,611		3,611	97.5	3,520
	$ 1,619,655	$ 3,611	$ 55,552	$ 1,567,714		$ 547,620

TRANSCRIPT

The National Cash Register Company
Sound Value Schedule - Engineering & Research
December 31, 1967

Year Acquired	Balance 12-31-66	Additions	Deductions	Balance 12-31-67	Sound Value %	Sound Value Value
1949 & Prior	$ 114,801			$ 114,801	20.0	$ 22,960
1950	67,805			67,805	22.5	15,260
1951	52,965			52,965	25.0	13,240
1952	45,558			45,558	27.5	12,530
1953	29,954			29,954	30.0	8,990
1954	56,830			56,830	32.5	18,470
1955	139,776			139,776	37.5	52,420
1956	136,049			136,049	42.5	57,820
1957	277,734			277,734	47.5	131,920
1958	167,273		$ 80,473	86,800	52.5	45,570
1959	82,519		82,519		57.5	
1960					62.5	
1961	53,441	$ 3,380		56,821	67.5	38,350
1962					72.5	
1963	276,903		146,859	130,044	77.5	100,780
1964	354,254			354,254	82.5	292,260
1965	320,503			320,503	87.5	280,440
1966	530,528	8,749	99,917	439,360	92.5	406,410
1967		828,546		828,546	97.5	807,830
	$ 2,706,893	$ 840,675	$ 409,768	$ 3,137,800		$ 2,305,250

TRANSCRIPT

The National Cash Register Company
Sound Value Schedule - Foundry Equipment
December 31, 1967

Year Acquired	Balance 12-31-66	Additions	Deductions	Balance 12-31-67	Sound Value %	Sound Value Value
1953 & Prior	$ 121,585			$ 121,585	20.00	$ 24,320
1954					22.50	
1955	7,234			7,234	25.00	1,810
1956	4,222			4,222	27.50	1,160
1957	15,824			15,824	30.00	4,750
1958	2,489			2,489	36.66	910
1959	6,267			6,267	43.33	2,720
1960	46,000			46,000	50.00	23,000
1961	677,111			677,111	56.66	383,650
1962	16,532			16,532	63.33	10,470
1963	19,561			19,561	70.00	13,690
1964	1,081			1,081	76.66	830
1965	1,350			1,350	83.33	1,120
1966	33,215			33,215	90.00	29,890
1967		$ 48,576		48,576	96.66	46,950
	$ 952,471	$ 48,576		$ 1,001,047		$ 545,270

The National Cash Register Company
Sound Value Schedule - Polishing & Plating Equipment
December 31, 1967

Year Acquired	Balance 12-31-66	Additions	Deductions	Balance 12-31-67	Sound Value %	Sound Value Value
1956 & Prior	$ 345,339			$ 345,339	20.00	$ 69,070
1957	8,364			8,364	22.5	1,880
1958	691			691	25.0	170
1959	3,419			3,419	27.5	940
1960	66,748			66,748	30.00	20,020
1961					35.00	
1962					45.00	
1963	1,893			1,893	55.00	1,040
1964	2,058			2,058	65.00	1,340
1965					75.00	
1966	58,869			58,869	85.00	50,040
1967		$ 1,254		1,254	95.00	1,190
	$ 487,381	$ 1,254		$ 488,635		$ 145,690

TRANSCRIPT

The National Cash Register Company
Sound Value Schedule - Other Mfg. Equipment
December 31, 1967

Year Acquired	Balance 12-31-66	Additions	Deductions	Balance 12-31-67	Sound Value %	Sound Value Value
1949 & Prior	$ 8,457,884		$ 99,015	$ 8,358,869	20.0	$ 167,180
1950	262,871		188,217	74,654	22.5	16,800
1951					25.0	
1952	232,063		232,063		27.5	
1953	351,501		10,158	341,343	30.0	102,400
1954	1,107,795	$ 71,596	107,897	1,071,494	32.5	348,240
1955	1,185,149	4,574	50,423	1,139,300	37.5	427,240
1956	1,182,286		62,947	1,119,339	42.5	475,720
1957	2,218,863		26,739	2,192,124	47.5	1,041,260
1958	1,581,113		31,025	1,550,088	52.5	813,800
1959	1,153,176		34,554	1,118,622	57.5	643,210
1960	953,496	2,591	18,761	937,326	62.5	585,830
1961	1,419,025	8,986	32,225	1,395,786	67.5	942,160
1962	1,353,446	33	31,305	1,322,174	72.5	958,580
1963	2,163,053	17,193	124,233	2,056,013	77.5	1,593,410
1964	800,190	7,972	16,001	792,161	82.5	653,530
1965	2,509,365	7,464	38,863	2,477,966	87.5	2,168,220
1966	5,540,276	14,002	1,242,942	4,311,336	92.5	3,987,990
1967		5,365,853	5,231	5,360,622	97.5	5,226,610
	$ 32,471,552	$ 5,500,264	$2,352,599	$ 35,619,217		$ 20,152,180

TRANSCRIPT

The National Cash Register Company
Sound Value Schedule - Tools
December 31, 1967

Year Acquired	Balance 12-31-66	Additions	Deductions	Balance 12-31-67	Sound Value %	Sound Value Value
1954 & Prior	$ 1,754,054		$ 859,267	$ 894,787	20.0	$ 178,960
1955	991,474			991,474	22.5	223,080
1956	1,058,363			1,058,363	25.0	264,590
1957	1,588,008			1,588,008	27.5	436,700
1958	2,002,780			2,002,780	30.0	600,830
1959	1,294,186			1,294,186	36.0	465,910
1960	1,601,728			1,601,728	43.0	688,740
1961	1,357,182			1,357,182	51.0	692,160
1962	1,173,096			1,173,096	58.5	686,260
1963	665,213			665,213	66.0	439,040
1964	569,376			569,376	73.5	418,490
1965	1,151,168			1,151,168	81.0	932,450
1966	906,846			906,846	88.5	802,560
1967		$ 1,034,012		1,034,012	96.0	992,650
	$ 16,113,474	$ 1,034,012	$ 859,267	$ 16,288,219		$ 7,822,420

TRANSCRIPT

1968

Form 945
PAGE 4

SCHEDULE 3 (MANUFACTURING INVENTORIES) STATE OF OHIO

INVENTORIES: MANUFACTURING, REFINING

List inventory of all personal property owned and used in this state in manufacturing or refining and subject to listing on the average value basis for the year or part thereof. Description of Business, Page 1, must justify manufacturing classification. Inventory of finished products not kept or stored at the place of manufacture or in a warehouse in the county where manufactured, must be listed in Schedule 3-B.

Inventory held for sale by a merchant must be listed in Schedule 3-A.

OTHER INVENTORIES LISTABLE AT YEAR-END VALUE MUST BE LISTED IN SCHEDULE 4.

LIST INVENTORY SEPARATELY IN EACH TAXING DISTRICT

COUNTY	Fayette			Guernsey			Guernsey			Montgomery									
TAXING DISTRICT	Union Twp.			Cambridge City			Cambridge Twp.			Dayton									
January	3	345	732	7	498	690	1	535	450	106	469	255							
February	3	562	755	7	823	460	1	602	590	108	555	464							
March	3	609	582	8	813	000	1	805	050	109	997	962							
April	3	523	230	8	803	500	1	804	770	112	163	852							
May	3	581	776	10	493	750	2	149	310	114	928	664							
June	3	353	031	9	734	380	1	997	880	111	505	974							
July	3	356	292	9	805	480	1	891	630	108	809	643							
August	3	176	874	9	404	090	1	926	120	109	662	144							
September	3	020	444	8	854	330	1	772	580	111	601	818							
October	2	997	231	8	456	800	1	752	120	112	456	632							
November	2	910	227	9	334	390	1	911	850	111	727	276	=	1570	361,	603			
December	3	560	519	10	489	660	2	189	430	113	922	774							
Total Value	39	997	873	108	867	350	22	318	580	1333	800	358							
Average Value	3	333	160	9	080	610	1	859	880	109	833	632							
List @ 50%	1	666	580	4	540	310		929	940	54	866	820	— 1514	130	E.C.V.D	290			

LIST INVENTORY SEPARATELY IN EACH TAXING DISTRICT

COUNTY																			
TAXING DISTRICT																			
January																			
February																			
March																			
April																			
May																			
June																			
July																			
August																			
September																			
October																			
November																			
December																			
Total Value																			
Average Value																			
List @ 50%																			

FURNISH COMPLETE INFORMATION BELOW:

Source of Inventory Values Listed: Physical _____ Gross Profits Method _____ Perpetual Stock Records _____

Method of Pricing: Cost _____ Market _____ L.C.M. _____ LIFO _____ Other _____

Are Purchases Accrued at End of Each Month? Copy of Computations Must be Attached to This Return

ADJUSTMENTS	DATE	AMOUNT	DR./CR.	Give dates of all physicals taken during taxable year
To convert to physical				
To convert to "LIFO"				
To reflect reserves				

TRANSCRIPT

Furnish detail showing application of adjustments to monthly averages.

Inventory Sch 3

3,560,519
10,689,660
2,189,450
113,922,374

130,361,003
246,974

114,029

130 361003
112 373474

17987,529

112 258 451
115 023

112,373,474

(Agent's figures)

TRANSCRIPT

1968

STATE OF OHIO **SCHEDULE 3A** (MERCHANDISING INVENTORIES) Form 945 PAGE 5

Merchants are entitled to list their average inventory in Schedule 3-A at 62%. Detailed instructions for the computation are set forth in the Instruction Sheet Form 959-A. SEE SCHEDULE 4 FOR INVENTORIES LISTABLE AT YEAR END VALUE

LIST INVENTORY SEPARATELY IN EACH TAXING DISTRICT

COUNTY	Summit	Stark	Hamilton	Cuyahoga	Lorain	Franklin
TAXING DISTRICT	Akron	Canton	Cincinnati	Cleveland	Lorain	Columbus
January	63 482	78 329	268 993	218 221	59 734	253 507
February	59 379	77 191	270 475	208 099	56 963	247 363
March	54 408	78 795	268 488	207 361	55 920	267 089
April	58 775	78 767	278 412	213 772	58 517	274 618
May	57 760	78 852	274 080	210 867	57 716	263 783
June	53 959	77 343	268 484	213 611	58 473	252 451
July	58 726	81 552	283 795	224 625	61 488	256 119
August	58 952	81 686	283 536	224 275	61 788	265 099
September	58 280	80 932	287 535	214 926	58 681	253 458
October	59 696	84 083	286 753	223 075	60 516	255 566
November	54 616	88 300	334 927	215 934	59 108	263 382
December	60 048	93 533	356 387	237 459	70 695	268 756
Total Values	728 245	969 051	3 334 415	2 690 815	720 353	3 080 191
Average Value	60 687	80 754	278 535	224 235	60 030	256 682
List Value 62%	38 130	51 710	185 560	138 120	37 220	161 920

LIST INVENTORY SEPARATELY IN EACH TAXING DISTRICT

COUNTY	Ross	Montgomery	Clark	Butler	Highland	Portsmouth
TAXING DISTRICT	Chillicothe	Dayton	Springfield	Hamilton	Hillsboro	Portsmouth
January	4 885	375 980	71 515	68 586	2 858	11 489
February	4 081	353 308	67 297	67 219	2 801	10 095
March	4 409	348 605	66 400	67 138	2 797	9 634
April	4 533	366 205	69 753	67 823	2 826	10 174
May	4 884	372 856	71 280	68 665	2 860	10 279
June	4 647	309 088	58 874	70 669	2 945	9 331
July	4 238	312 189	59 465	72 852	3 035	10 523
August	4 112	298 328	56 804	72 557	3 023	11 033
September	4 067	272 385	51 862	75 048	3 127	10 352
October	4 219	300 621	57 261	77 218	3 217	10 597
November	4 331	302 111	57 545	78 016	3 251	11 074
December	4 453	301 445	74 686	88 529	3 773	14 954
Total Values	50 911	4 006 117	762 522	874 278	36 453	129 535
Average Value	4 243	333 593	63 552	72 857	3 038	10 795
List Value 62%	2 870	210 160	40 060	45 900	1 910	6 800

FURNISH COMPLETE INFORMATION BELOW:

Source of Inventory Values Listed: Physical _____ Gross Profits Method _____ Perpetual Stock Records _____

Method of Pricing: Cost _____ Market _____ L.C.M. _____ LIFO _____ Other _____

Are Purchases Accrued at End of Each Month? Copy of Computations Must be Attached to This Return

ADJUSTMENTS	DATE	AMOUNT	DR./CR.	Give dates of all physicals taken during taxable year
To convert to physical				
To convert to "LIFO"				
To reflect reserves				

Furnish detail showing application of adjustments to monthly averages.

TRANSCRIPT

1968

Form 948
PAGE 6

SCHEDULE 3A SUPPLEMENT

STATE OF OHIO

COUNTY	Allen	Richland	Erie	Lucas	Defiance	Jefferson
TAXING DISTRICT	Lima	Mansfield	Sandusky	Toledo	Defiance	Steubenville
January	55 140	89 917	29 336	124 912	3 598	25 930
February	55 918	84 189	27 468	120 603	3 474	24 429
March	56 828	80 963	28 415	129 697	3 736	23 907
April	57 436	87 193	28 447	131 501	3 788	24 126
May	57 436	85 619	28 260	128 407	3 699	24 407
June	55 796	74 408	24 276	131 080	3 776	23 729
July	55 284	75 191	24 532	139 408	4 016	25 807
August	56 449	76 232	24 877	155 031	4 466	26 950
September	58 723	73 383	23 942	161 583	4 655	27 763
October	53 282	77 522	25 423	164 059	4 726	27 291
November	53 087	77 804	25 384	188 696	5 436	27 330
December	65 526	87 977	28 711	231 683	6 632	38 863
Total Values	670 920	971 798	317 065	1 806 660	52 002	320 532
Average Value	55 882	80 983	26 422	150 555	4 333	26 711
Max Value	65 210	87 977	28 711	231 683	6 632	38 863
Min Value	53 210	51 020	14 690	94 850	2 730	16 830

COUNTY	Mahoning	Ashtabula	Trumbull	Muskingham	Cuyahoga	Clark
TAXING DISTRICT	Youngstown	Ashtabula	Warren	Zanesville	Brooklin	Mad River Twp.
January	85 641	24 905	6 931	38 857	57 663	56 893
February	73 912	23 239	4 468	32 261	54 988	18 500
March	82 836	24 090	6 704	32 903	54 946	
April	84 112	25 042	6 969	30 654	56 487	
May	84 238	24 498	6 817	32 748	55 715	
June	82 717	24 055	6 694	31 904	56 444	
July	82 216	24 491	6 816	32 752	59 355	73 326
August	83 077	24 160	6 723	33 647	59 262	94 650
September	83 229	25 348	7 222	30 249	56 801	100 123
October	93 647	26 343	7 498	33 879	58 417	90 200
November	87 905	25 566	7 114	30 367	57 058	72 525
December	102 605	29 [illegible]	8 273	39 403	67 790	191 479
Total Values	1 046 136	302 801	84 229	397 644	674 927	697 696
Average Value	86 761	25 233	7 019	33 137	57 910	58 141
Min Value	73 680	23 900	4 420	20 880	36 480	36 630

COUNTY	Cuyahoga
TAXING DISTRICT	Euclid
January	9 668
February	9 220
March	9 213
April	9 471
May	9 341
June	9 464
July	9 952
August	9 936
September	9 523
October	9 794
November	9 587
December	11 592
Total Values	116 741
Average Value	9 728
Min Value	6 130

TRANSCRIPT

LIST INVENTORY SEPARATELY IN EACH TAXING DISTRICT

1968

STATE OF OHIO

SCHEDULE 3B

Form 945
PAGE 7

List monthly inventories of finished products of a manufacturer not kept or stored at the place of manufacture or in the county where manufactured. SEE SCHEDULE 4 FOR INVENTORIES LISTABLE AT YEAR END VALUE.

LIST INVENTORY SEPARATELY IN EACH TAXING DISTRICT

COUNTY																		
TAXING DISTRICT																		
January																		
February																		
March																		
April																		
May																		
June																		
July																		
August																		
September																		
October																		
November																		
December																		
Total Value																		
Average Value																		
List @ 70%																		

LIST INVENTORY SEPARATELY IN EACH TAXING DISTRICT

COUNTY																		
TAXING DISTRICT																		
January																		
February																		
March																		
April																		
May																		
June																		
July																		
August																		
September																		
October																		
November																		
December																		
Total Value																		
Average Value																		
List @ 70%																		

FURNISH COMPLETE INFORMATION BELOW:

Source of Inventory Values Listed: Physical _____ Gross Profits Method _____ Perpetual Stock Records _____

Method of Pricing: Cost _____ Market _____ L. C. M. _____ LIFO _____ Other _____

Are Purchases Accrued at End of Each Month? Copy of Computations Must be Attached to This Return

ADJUSTMENTS	DATE	AMOUNT	DR./CR.	Give dates of all physicals taken during taxable year
To convert to physical				
To convert to "LIFO"				
To reflect reserves				

TRANSCRIPT

Furnish detail showing application of adjustments to monthly averages.

SCHEDULE 4

1969

STATE OF OHIO 22

SCHEDULE 4—FURNITURE AND FIXTURES—MACHINERY AND EQUIPMENT—SUPPLIES NOT USED IN MANUFACTURING

List in this schedule tangible personal property not specifically required to be listed in Schedules 1, 2, 3, 3-A, or 3-B, such as office furniture and fixtures, machinery and equipment not used in manufacturing, inventories of other than a manufacturer or a merchant, supplies not used in manufacturing, hand equipment, amusement equipment and watercraft of a domestic corporation used exclusively in navigating any of the waters of Ohio. Show book value or "true value" and listed value @ 70% thereof.

Also list below, electrical equipment, generators, dynamos, engines and related machinery and appliances used for generating and distributing electricity for others. Show book value or "true value" and listed value @ 100% thereof.

RENTAL RATES: Personal property used in the business of preparing, serving and selling food in the form of meals suitable for immediate consumption by the purchaser, shall be listed and assessed at 68%.

COUNTY	TAXING DISTRICT	DESCRIPTION OF PROPERTY	DEPRECIATED BOOK VALUE	LISTING PERCENT	LISTED VALUE	TAXING DISTRICT TOTAL LISTED VALUES
Summit	Akron	Office Furniture & Equipment	$ 200,735	70		$ 140,510
Stark	Canton	"	261,470	70		183,030
Hamilton	Cincinnati	"	441,134	70		308,790
Cuyahoga	Cleveland	"	1 373,157	70		961,210
Lorain	Lorain	"	285	70		200
Franklin	Columbus	"	1 529,011	70		1 070,310
Ross	Chillicothe	"	1,160	70		810
Cuyahoga	Euclid	"	45,809	70		32,070
Clark	Springfield	"	8,391	70		5,870
Butler	Hamilton	"	257,384	70		180,170
Highland	Hillsboro	"	1,698	70		1,190
Portsmouth	Portsmouth	"	38,022	70		26,620
Allen	Lima	"	110,046	70		77,030
Richland	Mansfield	"	191,029	70		133,720
Erie	Sandusky	"	4,661	70		3,260
Lucas	Toledo	"	754,296	70		528,010
Defiance	Defiance	"	2,156	70		1,510
Jefferson	Steubenville	"	3,422	70		2,400
Mahoning	Youngstown	"	335,566	70		234,900
Ashtabula	Ashtabula	"	4,391	70		3,070
Trumbull	Warren	"	1,570	70		1,100
Muskingham	Zanesville	"	74,573	70		52,200
Cuyahoga	Brooklin	"	89,173	70		62,420
Clark	Madriver Twp.	"	846,461	70		592,520
Montgomery	Dayton	"	1 705,703	70		1 193,990
Guernsey	Cambridge Twp.	Office Furniture - Owned	50,880	70		35,620
"	"	" - Leased	4,800	70		3,360
"	" City	" - Leased	23,440	70		16,410
"	" City	" - Owned	248,430	70		173,890
Fayette	Union Twp.	Office Furniture & Equipment	30,710	70		21,500
Montgomery	Dayton	Non Mfg. Mach. and Equipment	7 275,120	70		5 092,580
"	Kettering	"	543,470	70		380,430
"	Oakwood	"	62,775	70		43,940
"	Dayton	Non Mfg. Supplies	179,309	70		125,520
"	"	Office F & F & M & E Supply	26,345	70		18,440
"	"	" Division Supply	19,225	70		13,460
"	"	Training Mach. Data Center	565,330	70		395,730
	Grand Total		$ 17 508,115			$ 12 255,690

TRANSCRIPT

The National Cash Register Company
Sound Value Schedule - Furniture & Fixtures (Owned)
Guernsey County - Cambridge Township
December 31, 1967

Year Acquired	Balance 12-31-66	Additions	Deductions	Balance 12-31-67	Sound Value %	Sound Value Value
1956 & Prior						
1957						
1958						
1959						
1960						
1961						
1962						
1963						
1964	$ 3,491.72			$ 3,491.72	65.0	$ 2,270
1965	6,757.63			6,757.63	75.0	5,070
1966	41,017.68			41,017.68	85.0	34,860
1967		$ 9,132.57		9,132.57	95.0	8,680
	$ 51,267.03	$ 9,132.57		$ 60,399.60		$ 50,880

4

TRANSCRIPT

The National Cash Register Company
Sound Value Schedule - Furniture & Fixtures (Leased)
Guernsey County - Cambridge Township
December 31, 1967

Year Acquired	Balance 12-31-66	Additions	Deductions	Balance 12-31-67	Sound Value %	Sound Value Value
1956 & Prior						
1957						
1958						
1959						
1960						
1961						
1962	$ 2,024		$ 2,024		45	
1963	1,134			$ 1,134	55	$ 620
1964	5,909			5,909	65.0	3,840
1965	447			447	75.0	340
1966						
1967						
	$ 9,514		$ 2,024	$ 7,490		$ 4,800

TRANSCRIPT

The National Cash Register Company
Sound Value Schedule - Furniture & Fixtures (Leased)
Guernsey County - Cambridge City
December 31, 1967

Year Acquired	Balance 12-31-66	Additions	Deductions	Balance 12-31-67	Sound Value %	Sound Value Value
1956 & Prior						
1957						
1958						
1959						
1960						
1961						
1962	$ 9,884		$ 9,884			
1963	5,538			$ 5,538	55.0	$ 3,050
1964	28,849			28,849	65.0	18,750
1965	2,181			2,181	75.0	1,640
1966					85.0	
1967					95.0	
	$ 46,452		$ 9,884	$ 36,568		$ 23,440

TRANSCRIPT

The National Cash Register Company
Sound Value Schedule - Furniture & Fixtures (Owned)
Guernsey County - Cambridge City
December 31, 1967

Year Acquired	Balance 12-31-66	Additions	Deductions	Balance 12-31-67	Sound Value %	Sound Value Value
1956 & Prior						
1957						
1958						
1959						
1960						
1961						
1962						
1963						
1964	$ 17,047.80			$ 17,047.80	65.0	$ 11,080
1965	32,993.12			32,993.12	75.0	24,750
1966	200,262.78			200,262.78	85.0	170,220
1967		$ 44,588.49		44,588.49	95.0	42,360
	$ 250,303.70	$ 44,588.49		$ 294,892.19		$ 248,410

TRANSCRIPT

The National Cash Register Company
Sound Value Schedule - Non-Manufacturing Equipment (Dayton)
December 31, 1967

Year Acquired	Balance 12-31-66	Additions	Deductions	Balance 12-31-67	Sound Value %	Sound Value
1956 & Prior	$ 2,757,946			$ 2,757,946	20.0	$ 551,590
1957	1,233,678		$ 16,736	1,216,942	22.5	273,810
1958	789,041		219,015	570,026	25.0	142,510
1959	701,424		116,840	584,584	27.5	160,760
1960	812,240		153,355	658,885	30.0	197,670
1961	1,508,096	$ 47,255	11,486	1,543,865	35.0	540,350
1962	242,025	107,495	50,179	299,341	45.0	134,700
1963	1,365,276	245,062	80,630	1,529,708	55.0	841,340
1964	251,747	164,101	54,790	361,058	65.0	234,690
1965	1,378,391	284,707	17,880	1,645,218	75.0	1,233,910
1966	1,510,575	143,363	184,883	1,469,055	85.0	1,248,700
1967		1,850,849	45,493	1,805,356	95.0	1,715,090
	$ 12,550,439	$ 2,842,832	$ 951,287	$ 14,441,984		$ 7,275,120

TRANSCRIPT

The National Cash Register Company
Sound Value Schedule - Non-Manufacturing Equipment - Kettering
December 31, 1967

Year Acquired	Balance 12-31-66	Additions	Deductions	Balance 12-31-67	Sound Value %	Sound Value Value
1966	$ 281,464		$ 67,646	$ 213,818	85.0	$ 181,750
1967		$ 341,276		341,276	95.0	324,210
	$ 281,464	$ 341,276	$ 67,646	$ 555,094		$ 505,960

Moraine Farms Furniture & Fixtures - Sound Value $37,510

Total Kettering - Sound Value $543,470

TRANSCRIPT

The National Cash Register Company
Sound Value Schedule - Non-Manufacturing Equipment (Oakwood)
December 31, 1967

Year Acquired	Balance 12-31-66	Additions	Deductions	Balance 12-31-67	Sound Value %	Sound Value Value
1956 & Prior	$ 98,108			$ 98,108	20.0	$ 19,620
1957	14,769			14,769	22.5	3,320
1958	248			248	25.0	60
1959	19,200			19,200	27.5	5,280
1960	14,654			14,654	30.0	4,400
1961	883			883	35.0	310
1962	978			978	45.0	440
1963	11,308			11,308	55.0	6,220
1964	2,566			2,566	65.0	1,670
1965					75.0	
1966					85.0	
1967		$ 3,029		3,029	95.0	2,800
	$ 162,714	$ 3,029		$ 165,743		$ 44,200

Sugar Camp Furniture & Fixtures - Sound Value $18,575

Total Oakwood Sound Value $62,775

TRANSCRIPT

Form 948
PAGE 10

RECAPITULATION OF LISTED VALUES OF TANGIBLE PERSONAL PROPERTY

1968

RECAPITULATION

STATE OF OHIO

(1)

	COUNTY	TAXING DISTRICT Townships, Special School Districts, Cities and Incorporated Villages Give Complete Names	Domestic Animals & Agricultural Products From Schedule 1 (Nearest $10)	Machinery, Tools & Implements From Schedule 2 (Nearest $10)	Inventories Manufacturing From Schedule 3 (Nearest $10)	Inventories Merchandising From Schedule 3A (Nearest $10)	Inventories From Schedule 3B (Nearest $10)	Furniture & Fixtures, Etc. From Schedule 4 (Nearest $10)	Total Gross Listed Value Taxable
					54,427,990				Total
1	Montgomery	Dayton 102		16 338 530	58 [illegible] 820	210 160		6 837 620	78 [illegible] 950
2	"	Oakwood						43 940	43940
3	"	Kettering						380 430	380430
4	"	Miami Twp.		2210					2210
5	Fayette	Union		1 060 700	1 666 580			21 500	2 748780
6	Guernsey	Cambridge City		1 362 900	4 540 310			190 300	6 093510
7	"	Cambridge Twp.		275160	929 960			38 980	1 243080
8	Summit	Akron				38 130		140 510	178640
9	Stark	Canton				52 710		183 030	234740
10	Hamilton	Cincinnati				185 560		308 790	494350
11	Cuyahoga	Cleveland				138 120		961 210	1 099330
12	"	Euclid				6 130		32 070	38200
13	"	Brooklyn				36 480		62 420	98900
14	Lorain	Lorain				37 820		200	38020
15	Franklin	Columbus				161 920		1 070 310	1 232230
16	Ross	Chillicothe				2 670		810	3480
17	Clark	Springfield				40 040		5 870	45910
18	"	Mad River Twp.				36 630		592 520	629150
19	Butler	Hamilton				45 900		180 170	226070

TRANSCRIPT

32

30

RECAPITULATION OF LISTED VALUES OF TANGIBLE PERSONAL PROPERTY

STATE OF OHIO — RECAPITULATION — 1968

	COUNTY	TAXING DISTRICT (Township, Special School District, City and Incorporated Village — Give Complete Name)	Form Schedule 1 (Nearest $10)	Form Schedule 2 (Nearest $10)	Form Schedule 3 (Nearest $10)	Form Schedule 3A (Nearest $10)	Form Schedule 3B (Nearest $10)	Form Schedule 4 (Nearest $10)	Taxing District Local Value Basis
1	Highland	Hillsboro				1 910		1 190	3 100
2	Scioto	Portsmouth				6 800		26 620	33 420
3	Allen	Lima				35 210		77 030	112 240
4	Richland	Mansfield				52 080		133 720	184 740
5	Erie	Sandusky				16 650		3 260	19 910
6	Lucas	Toledo				94 850		528 010	622 860
7	Defiance	Defiance				2 730		1 510	4 240
8	Jefferson	Steubenville				16 830		2 400	19 230
9	Mahoning	Youngstown				54 660		234 900	289 560
10	Ashtabula	Ashtabula				15 900		126 310 / 3 070	147 210 / 18 970
11	Trumbull	Warren				4 420		1 100	5 520
12	Muskingham	Zanesville				20 880		52 200	73 080
13	Washington	MARIETTA	Omitted						1 450
14									
15									92 719 440
16		TRANSCRIPT							94 187 140
17									
18									
19		Grand Total		19 043 500	61 803 650	1 313 130		18 115 690	94 275 920

Form 948 PAGE 11

33

31

1968

INTANGIBLE PROPERTY SCHEDULES 6-7-8-9-10

STATE OF OHIO

Form 945
PAGE 15

TAXABLE INVESTMENTS—SCHEDULE 6 & 7 BONDS, NOTES, DEBENTURES, CONTRACTS, INVESTMENT TRUST SHARES, DEPOSITS (Outside Ohio bearing more than 4%), PATENT & COPYRIGHT ROYALTIES (Schedule Formula), ANNUITIES, INTERESTS IN TRUST FUNDS. List in Schedule 7, investments yielding income which have not been outstanding for the full calendar year preceding listing date. Name of Corporation, Debtor, Issuer, Trustee	Face Value	PRODUCTIVE INVESTMENTS SCHEDULE 6: % in 1967	PRODUCTIVE INVESTMENTS SCHEDULE 6: Income Yield in 1967	UNPRODUCTIVE INVESTMENTS SCHEDULE 7: Quantities If Any	UNPRODUCTIVE INVESTMENTS SCHEDULE 7: True Value Yield
FEDERAL ELECTION- ENTER TAXABLE INCOME IF FORM 912 IS USED					
TOTAL INCOME YIELD- Schedule 6					
TOTAL TRUE VALUE- Schedule 7					

The corporation must elect to file with its return or with the Tax Commissioner at Columbus, Ohio a verified summary of its Federal Income Tax Return (Form 1120) for the last preceding taxable year, together with a statement of the aggregate amount of income derived from investments taxable under Ohio law, the income from which it is not required to report for federal income tax purposes.

The reporting of income by the above method does not relieve the taxpayer from listing investments not yielding income in Schedule 7 above.

If the amount from investments yielding income as shown on this return differs from the amount from like sources as shown on the Federal Income Tax Return of the Corporation, a statement must be attached explaining this difference.

If the corporation holds investments in its name as nominee, a statement must be attached showing the issue and the name and address of the owner thereof.

DEPOSITS—SCHEDULE 8	
CHECKING ACCOUNTS, SAVINGS ACCOUNTS, CERTIFICATES OF DEPOSITS OR WITHDRAWABLE STOCK OUTSIDE Ohio held on November 27, 1967 and yielding 4% or less	
POSTAL SAVINGS held on November 27, 1967	
TOTAL DEPOSITS	

TAXABLE CREDITS—SCHEDULE 9

LINE NO.	BALANCE SHEET ACCOUNTS	WITHIN OHIO (1)	TOTAL (2)
1	Net Notes and Accounts Receivable - Due within One Year from Date of Inception	49,998,179.24	252,778,892.87
2	Prepaid Expenses	241,552.96	873,960.11
3	Other (designate)		
4	TOTAL RECEIVABLES AND PREPAID ITEMS (Lines 1, 2, 3)	50,239,732.20	253,652,853.98
5	Ohio Allocation (Column 1 ÷ Column 2) 19.80649 %		
6	Notes and Accounts Payable—Due within One Year from Date of Inception		200,234,554.83
7	Accrued Expenses—Excluding Taxes and Assessments		10,936,887.72
8	Other (designate)		
9	TOTAL PAYABLES AND EXPENSES (Lines 6, 7, 8)		211,171,442.55
10	CREDITS (Line 4 less Line 9, Column 2)		42,481,411.43
11	OHIO CREDITS (Line 5 x Line 10)		8,414,076.51

MONEY AND OTHER TAXABLE INTANGIBLES- SCHEDULE 10	
CASH ON HAND OR IN SAFE DEPOSIT BOX (Not on Deposit in Financial Institutions)	590,473.01
UNCOLLECTED CHECKS, JUDGMENTS, NON INTEREST BEARING ACCOUNTS Due after one year from date of inception	
ALL OTHER TAXABLE INTANGIBLES	
NON-TAXABLE BONDS AND SECURITIES REPRESENTING PROCEEDS OF TAXABLE PROPERTY CONVERTED AFTER OCTOBER 31, 1967	
DEPOSITS REPRESENTING PROCEEDS OF TAXABLE PROPERTY CONVERTED AFTER NOVEMBER 27, 1967 TO THE EXTENT HELD ON LISTING DAY	
TOTAL AMOUNT OF MONEY and OTHER TAXABLE INTANGIBLES	590,473.01

TRANSCRIPT 32

Form 945 1968 STATE OF OHIO
PAGE 16

RECAPITULATION

Classified or Intangible Personal Property

CLASSIFIED TAX LIST			TOTAL LISTED VALUE	RATE OF TAX	AMOUNT OF TAX (Base Gross Total Listed Value)
SCHEDULE 6	PRODUCTIVE INVESTMENTS	(Nearest $ 1)		5%	
SCHEDULE 7	UNPRODUCTIVE INVESTMENTS	(Nearest $10)		.002	
SCHEDULE 8	DEPOSITS	(Nearest $10)		.002	
SCHEDULE 9	TAXABLE CREDITS	(Nearest $10)	[illegible]	.002	[illegible]
SCHEDULE 10	MONEY AND OTHER TAXABLE INTANGIBLES	(Nearest $10)	[illegible]	.002	[illegible]
TOTAL CLASSIFIED TAX					[illegible]

DO NOT SEND CHECK TO THE OFFICE OF THE TAX COMMISSIONER

[illegible] to the Treasurer of State of Ohio upon receipt of billing from him.

[illegible] K28 V10

Complete Following Schedule of Leased, Consigned or Warehoused Taxable Property

When taxable personal property not owned by the corporation and not shown on its balance sheet did it hold on leases, consignments, or consignment, under conditions of sale or otherwise, or on the use of which the corporation has based its own property? In the event the taxpayer filing this report is engaged in production on any of this property, please list names in appropriate schedule.

Name of Lessor	Address of Owner	Description	County Where Located	Value - Leased or Consigned (Cost) - Stock in Warehouse

COUNTY AUDITOR(S) MUST BE NOTIFIED OF ALL CHANGES IN VALUATION OF REAL ESTATE OWNED OR OCCUPIED.

DECLARATION

I declare under penalties of perjury that this return (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is a true, correct and complete return and report.

6-12-68
Date

Director of Taxes and Group Benefits (Corporate Officer) J. F. Martin
Title Signature of Officer

If this return was not prepared by your own personnel, show here name and address of firm or individual who prepared it.

Name _____ Address _____

- 1 -

Item 1. Number of Equity Security Holders

Title of class	Number of holders (December 31, 1967)
Common stock with $5 par value	26,055
Preferred stock cumulative with $5 par value	None

Item 2. Increases and Decreases in Outstanding Equity Securities

	Number of common shares ($5 par value) issued and outstanding
Balance, January 1, 1967	8,793,963
Options exercised by employees from January 16, 1967 through December 26, 1967 under Company's stock option plan for key personnel	47,200
Issued in connection with acquisition of February 28, 1967 of the assets of The Microcard Corporation (Note)	65,000
Issued in connection with acquisition of August 22, 1967 of 70% of the assets of Erlanger and Galinger, Inc. (Note)	9,140
Issued on conversion of 4.25% Subordinated convertible debentures	4,330
Balance, December 31, 1967	8,919,633

Note: These shares were not registered under the Securities Act of 1933 as the issue of such shares to the Stockholders of the Microcard Corporation and the Stockholders of Erlanger & Galinger, Inc. is exempt under Section 4(2) of that Act as not involving any public offering.

Item 3. Parents and Subsidiaries of Registrant

Parents of the registrant - None

Subsidiaries of registrant	The state or other sovereign power under the laws of which organized	The percentage of voting securities owned, or other basis of control, by its immediate parent
THE NATIONAL CASH REGISTER COMPANY		
Business Systems, Incorporated	California	100
The Microcard Corporation	Wisconsin	100
NCR International Finance Corporation	Delaware	100
Maatschappij Vennootschap National Easregisters voorheen Cord H. van Erk H. V. Het Easregisterhuis	Netherlands	82
	Netherlands	100
NACAR of Pennsylvania, Inc.	Pennsylvania	100
NACAR Technical Center (Dayton), Inc.	Ohio	100
NACAR of San Diego, Inc.	Delaware	100
NACAR of Viroqua, Inc.	Delaware	100
NACAR of Washington, Inc.	Delaware	100
La Nationale Caisse Enregistreuse (Afrique)	Algeria	100

TRANSCRIPT

THE NATIONAL CASH REGISTER COMPANY (Cont'd)

NCR Argentina SAIC	Argentina	100
The National Cash Register Co. Pty. Limited	Australia	100
National Registrier-Kassen Gesellschaft m.b.H.	Austria	100
Caisses Enregistreuses "National" S.A.	Belgium	100
NCR do Brasil S.A., Caixas Registradoras, Maquinas de Contabilidade e Equipamentos Electronico "National"	Brazil	100
The National Cash Register Company of Canada, Limited	Canada	100
Cajas Registradoras Nacional S. A. C.	Chile	100
The National Cash Register Company of Colombia, S. A.	Colombia	100
The National Cash Register Company of Cuba, S. A.	Cuba	100
NCR Dominicana C. por A.	Dominican Republic	65
Oy The National Cash Register Company of Finland AB	Finland	100
NCR La Nationale Caisses Enregistreuses	France	100
La Nationale Caisses Enregistreuses (Tunisie) S.A.	Tunisia	100
National Registrier Kassen G.m.b.H.	Germany	100
Cajas Registradoras National, Sociedad y Compania, Limitada	Guatemala	50
The National Cash Register Company (Hong Kong) Limited	Hong Kong	100
The National Cash Register Company (Iraq) W. L. L.	Iraq	85
The National Cash Register Company (Jamaica) Limited	Jamaica	100
The National Cash Register Company (Japan) Ltd.	Japan	70
The National Cash Register Company (Singapore) Limited	Singapore	100
The National Cash Register Company (Malaya) Limited	Malaya	100
The National Cash Register Company de Mexico S. A.	Mexico	100
The National Cash Register Company de Baja California S. A.	Mexico	100
N. C. R. Industrial de Mexico S. A. de C. V.	Mexico	65
La Nationale Caisses Enregistreuses S. A.	Morocco	100
The National Cash Register Company (N. Z.) Limited	New Zealand	100
The National Cash Register Company (West Africa) Limited	Nigeria	100
National Kassa Register A/S	Norway	100
Compania de Cajas Registradoras Nacional de Panama, S. A.	Panama	100
NCR del Peru S. A.	Peru	100
Erlanger and Galinger, Inc.	Philippines	70

TRANSCRIPT

THE NATIONAL CASH REGISTER COMPANY (Cont'd)

The National Cash Register Company of Portugal	Portugal	100
The National Cash Register Company of Puerto Rico	Puerto Rico	100
The National Cash Register Company C. A. (Private) Limited	Rhodesia	100
The National Cash Register Company, S. A. (Proprietary) Limited	South Africa	100
Cajas Registradoras National S. A.	Spain	100
The National Cash Register Company (Sudan) Limited	Sudan	100
The National Cash Register Company of Sweden Aktiebolag	Sweden	100
"National" Registrierkassen A. G.	Switzerland	100
The National Cash Register S. A.	Tangier	100
"NCR" National Nakayyit Kasa Anonim Sirketi	Turkey	70
The National Cash Register Company, Limited	United Kingdom	100
National Cash Register (Leasing) Limited	United Kingdom	100
The National Cash Register Company (Cyprus) Limited	Cyprus	60
The National Cash Register Company (Ghana) Limited	Ghana	100
Frank Stevenson & Son (Manchester) Limited	United Kingdom	100
James McKelvie & Sons Ltd.	United Kingdom	100
NCR/Elliott Computer Workshops Ltd.	United Kingdom	50
Express Travel & Transport Co. Ltd.	United Kingdom	100
Knights Export Consultants Ltd.	United Kingdom	100
Robert Ulrich Ltd.	United Kingdom	100
Travel Deposit Ltd.	United Kingdom	100
The National Cash Register Company (Manufacturing) Limited	United Kingdom	100
The National Cash Register Company, Sociedad Anonima	Uruguay	100
The National Cash Register Company of Venezuela, Compania Anonima	Venezuela	100

Note - The accounts of all foreign subsidiaries except Cuba listed above are included in the statement of consolidated financial position at December 31, 1957 and in the consolidated statement of income for the year ended December 31, 1957.

36

TAX FORM NO. 986
PRESCRIBED BY THE TAX COMMISSIONER.

STATE OF OHIO

CLAIM FOR DEDUCTION FROM BOOK VALUE

(See Instructions on Back)

Made by The National Cash Register Company

Address Main and K Streets, Dayton, Ohio 45406

Date JUN 12 1968 19__

The undersigned taxpayer, having listed tangible personal property used in business and credits on Tax Form No._____ at the book value thereof hereby makes claim for the assessment of such property, or portions thereof as herein stated, on basis of its true value, instead of the book value, less book depreciation, as listed in the tax return.

TAXING DISTRICT	TANGIBLE PROPERTY	SCHEDULE 1	SCHEDULE 2	SCHEDULE 3	SCHEDULE 4	TOTALS
1. Dayton, Ohio Montgomery County	Book Value			2,159,035		
	Deduction Claimed			2,159,035	@50 1079520	
2. Dayton, Ohio Montgomery County	Book Value			1,753,295		
	Deduction Claimed			874,025	@50 437010	
3.	Book Value					
	Deduction Claimed					
4.	Book Value					
	Deduction Claimed					
5.	Book Value					
	Deduction Claimed					
TOTALS	Book Value			3,912,330		
	Deduction Claimed			3,033,060		
	Claimed True Value			879,270		

TAXING DISTRICT	ITEMIZE	REMARKS
CURRENT CREDITS Bank Accounts, Notes and Other Receivables	Book Value	
	Deduction Claimed	
	Claimed True Value	

Claims for any deduction from net book value of accounts receivable or depreciated book value of personal property may not be considered or allowed unless made in writing by the taxpayer at the time of making return. Such claim should be accompanied by detailed information in support thereof.

No. 1. Another Taxpayer claims that inventories held for export in the average amount of $2,159,035 are not subject to taxation in this state by virtue of the provisions of the constitution of the United States, Article 1, S 10, Clause 2. Assessed value @ 50% is $1,079,520. This claim is not deducted from schedule 3.

1753,295 Rebates, Dec.

No. 2. Another Taxpayer claims that account 22530 in the amount of $1,735,295 consists of idle, obsolete, unsalable inventory and that the true value is 10% of original cost of $8,792,704 or $879,270; therefore, inventory is overstated $874,025. Assessed value @ 50% $437,010. This claim is not deducted from schedule 3.

Taxpayer Value 874,644,820
Taxpayer claim 151,452,800
County Value assessed 531,507,910

claim denied by HOS 3/27/68

1079520
437010
151,452,800

L. V. Richardson

The National Cash Register Company
Claimant

By [signature]
Director of Taxes and Group Benefits
(Corporate Officer)

37

TAX FORM 931
PRESCRIBED BY THE
TAX COMMISSIONER

BALANCE SHEET FOR CORPORATIONS
1968

STATE OF OHIO

The National Cash Register Company, Main and K Streets, Dayton, Ohio

INSTRUCTIONS

GENERAL INSTRUCTIONS:

1. It is mandatory that a completed Balance Sheet be submitted by every Corporation required to file Franchise Form F-1 or Personal Property Forms 930 or 945.
2. In addition to a separate Balance Sheet for each corporation, there must be submitted a consolidating Balance Sheet where the corporation is authorized to file a Consolidated Personal Property Tax Return.
3. File this Form with Personal Property Tax Form 930 or 945 between February 15 and April 30 annually, or within the filing time as extended. In the event a Personal Property Tax Return is not required, mail this Form to the Office of the Tax Commissioner, 68 East Gay Street, Columbus, Ohio 43215.
4. The fiscal year and employed in the preparation of this Balance Sheet shall coincide with the fiscal year end used for Federal Income Tax with the following qualifications:
   (a) Any corporation required to make a return on the basis of a fiscal year and who has not been engaged in business in Ohio for a full year of twelve months preceding such fiscal year end shall use the date otherwise prescribed by law (December 31).
   (b) If your fiscal year ends between January 1 and March 31, use the fiscal year terminating in the same calendar year in which the return is required to be filed.
   (c) If your fiscal year ends after March 31, use the fiscal year terminating in the calendar year next preceding the year in which the return is required to be filed.
5. Where the space provided on this Form is inadequate, supplemental exhibits must be attached.

SPECIAL INSTRUCTIONS:

1. Tangible Property shall be allocated within and without Ohio on the basis of its physical location at Balance Sheet date.
2. Intangible Property shall be allocated within and without Ohio on the basis of its taxable situs.
   (a) DEPOSITS—Deposits of a domestic corporation must be allocated within Ohio unless the withdrawing officer has his office without Ohio and the funds are used exclusively in business without Ohio. Deposits of a foreign corporation must be allocated within Ohio when the withdrawing officer has his office in Ohio and the funds are used exclusively in business in Ohio. The state in which the deposits are physically located is not an operating factor as exclusive use and withdrawability are the tests used in determining taxable situs. (Tax Commissioner's Rule TX-41-18.)
   (b) RECEIVABLES—Domestic corporations must allocate notes and accounts receivable within Ohio except when they result from (1) sales made or services performed by an officer or agent without Ohio or (2) shipments made from a stock of goods located without Ohio. Foreign corporations must allocate notes and accounts receivable within Ohio when they result from (1) sales made by an officer or agent located in Ohio and shipped from a stock of goods located within Ohio, or (2) the sale by an officer or agent located in Ohio of services performed in Ohio, and (3) the officer or agent has power to deal in a managerial capacity with such accounts and notes receivable and with the funds, in whole or in part, derived therefrom. (Tax Commissioner's Rule TX-41-19.)
   (c) INVESTMENTS—Investments used in business (not held in trust) acquire a tax situs in a state other than that in which it was incorporated when arising out of business and used in business in such other state. Such investments shall be deemed to arise out of business in a state other than that in which the corporation was incorporated when made, created, or acquired, in the course of repeated transactions of the same kind, conducted from an office of the corporation in such other state, and
      (1) Representing obligations of persons residing in such other state, or
      (2) Secured by property located in such other state, or
      (3) When an officer or agent of the corporation at its office in such other state, has authority, in the course of the corporation's business, to receive or collect the income thereon or the principal, if any, or both, when due, or to sell and dispose of the same.

   Where investments include fifty-one per cent or more of the total outstanding common stock of a subsidiary corporation, such stock must be allocated within and without Ohio in accordance with the physical location of the property belonging to or used by the subsidiary. Physical property generally will include all real and tangible personal property, but is not limited thereto.
   (d) DEFERRED AND PREPAID ITEMS—Tax situs follows domicile of owner except when the right acquired thereby relates exclusively to the business transacted in a state other than that where the owner resides, or to the property used in such business.

TRANSCRIPT

1968

Name The National Cash Register Company Ohio Charter No. 120783

Address Main and K Streets, Dayton, Ohio 45406

Personal Property Tax
Return Filed: ..... County Inter-County ☒ Not Required ☐

BALANCE SHEET AS OF December 31, 19 67

SCHED. NO. #	ASSETS		WITHIN OHIO NET BOOK VALUES	TOTAL* NET BOOK VALUES
	1 CASH AND DEPOSITS			
4,9	a) In Financial Institutions		$ 4,438,115.84	$ 7,271,026.25
10	b) Not in Financial Institutions		590,472.01	7,596,085.91
	2 NOTES AND ACCOUNTS RECEIVABLE			
9	a) Due within one year from date of inception ..... Gross $	50,662,056.07		
	Less allowance for doubtful accounts	663,876.83	49,998,179.24	124,871,156.09
4,7,10	b) Due after one year from date of inception—net			
	3 INVENTORIES			
3	a) Manufacturing		112,258,451.60	151,133,340.95
24,25	b) Merchandising		2,690,530.00	31,972,535.20
3	c) Supplies—Manufacturing		135,023.36	135,023.36
4	d) Supplies—Other		179,909.05	179,909.05
2,3,4	e) Consigned			
24,25	f) Other Inventory			
	4 INVESTMENTS			
4,7,10	a) Taxable Bonds and other investments		—	51,915,896.92
—	b) Stocks and other non-taxable investments		1,878,031.62	4,963,656.96
—	5 LAND			
		GROSS COST		
	6 BUILDINGS	$ 36,964,422.86	21,319,050.95	42,996,745.98
	7 MACHINERY & EQUIPMENT			
—	a) Taxed as Real Estate			
2,4	b) Taxed as Personal Property	43,090,754.66	22,634,439.48	47,523,947.47
4	8 FURNITURE & FIXTURES	39,512,534.11	14,754,277.96	98,650,460.44
2,4	9 LEASED EQUIPMENT			
—	10 POLLUTION CONTROL Facilities (a)		57,159.00	57,159.00
—	11 PATTERNS, JIGS, DIES & DRAWINGS	44,510,810.75	7,834,261.74	7,834,261.54
	12 CONSTRUCTION IN PROGRESS			
—	a) Real Property			
2,4	b) Personal Property capable of use			
—	c) Personal Property not capable of use			
2,4	13 SMALL TOOLS	11,488,843.22	11,325,204.85	15,341,560.89
	14 VEHICLES & AIRCRAFT			
—	a) Registered or Licensed	2,480,368.07	1,196,114.75	2,517,466.39
2,4	b) Other			
	15 OTHER ASSETS			
	a) Prepaid expenses		241,552.96	873,960.11
9	b) Deferred charges		889,992.08	5,256,082.09
—	c) Patents & Copyrights		250,000.99	250,000.99
4	d) Subsidiary Investment			76,849,444.77
	e)			
	f)			
	g)			
	16 TOTAL ASSETS (Lines 1 through 15)		$ 252,590,168.48	$ 678,169,118.36

* Omit Total Assets Column when all assets are allocated to Ohio.
Personal Property Tax Return schedule references are not all-inclusive but are for guidance only. See Form 930-A—Instructions.
(a) Certified Air and/or Water Pollution Control Facilities.

SCHED. NO. #	LIABILITIES AND NET WORTH		TOTAL
9	17 NOTES AND ACCOUNTS PAYABLE:	Due Within One Year from Date of Inception	$ 43,740,312.92
9	18 ACCRUED EXPENSES	(Detail in Exhibit "B")	46,087,026.01
—	19 NOTES AND ACCOUNTS PAYABLE:	Due After One Year from Date of Inception	234,206,200.00
—	20 BONDS AND MORTGAGES		18,495,000.00
—	21 OTHER LIABILITIES	(Detail in Exhibit "B")	21,763,638.87
—	22 DEFERRED CREDITS	(Detail in Exhibit "B")	
—	23 PREFERRED STOCK		
—	24 COMMON STOCK		44,598,165.00
—	25 PAID-IN SURPLUS		146,113,055.29
—	26 EARNED SURPLUS-UNDIVIDED PROFITS		122,065,720.27
—	27 SURPLUS RESERVES	(Detail in Exhibit "B")	
—	28 OTHER (Designate)		
—	29 TOTAL LIABILITIES & NET WORTH	(Lines 17 through 28)	$ 678,169,118.36

Exhibit "A" - RECONCILIATION OF BALANCE SHEET LINE NUMBERS 3, 7b, 8, 9, 12b, 13 and 14b.

Where values set forth in the Balance Sheet are not carried forward in the full amount to taxable schedules in the Corporation Return of Taxable Personal Property, such differences set forth in Column 4 of this exhibit must be fully supported in Column 5 or in supplemental schedules.

(1) B/S LINE NO.	(2) BOOK VALUE	(3) VALUE REPORTED	(4) DIFFERENCE	(5) RECONCILE DIFFERENCES
3A	$ 130,246,974.60	$ 112,258,451.60	($17,988,523.00)	Life Reserve
7B	22,634,439.68	30,127,602.00	7,493,162.52	
8	14,754,277.96	17,279,875.00	2,525,597.04	
13	11,325,206.85	7,822,420.00	(3,502,786.85)	
7B		141,518.00	141,518.00	Leased Machinery and Equipment
8		28,240.00	28,240.00	Leased Furniture and Fixtures

Exhibit "B" - ITEMIZATION OF BALANCE SHEET LINE NUMBERS 18, 21, 22 and 27.

List here a descriptive breakdown of items making up values reflected on the Balance Sheet Lines indicated.

(1) B/S LINE NO.	(2) ITEMIZATION	(3) AMOUNT
18	Maintenance Agreements and Guaranteed Service	$ 35,788,237.12
18	Accrued Interest Payable	1,856,757.47
18	Accrued Salary and Wage Payments	4,438,881.37
18	Commission Payable	3,199,451.01
18	Miscellaneous	1,603,697.04
21	Real and Personal Property Taxes	6,643,949.35
21	F.I.C.A. and Income Tax Withheld	2,254,525.22
21	All Other Taxes	5,829,782.98
21	Contingencies	960,417.00
21	Federal Income Tax	3,652,104.40
21	Miscellaneous	2,422,859.72

TRANSCRIPT

Exhibit "C" - EXEMPTED ASSETS (FRANCHISE)

The total of exempted assets set forth in this exhibit may be deducted from total net worth in the computation of the net value of stock in Exhibit "D" and excluded in the computation of the property fraction in Exhibit "E" when such assets are recorded on the books of record and are reflected in the total value of assets on Balance Sheet Line 16.

Air and Water Pollution Control Facilities, located in Ohio, are exempted assets when the corporation holds a valid certificate. Air or water control facilities, located without Ohio, cannot be listed in Exhibit "C" as exempted assets.

LINE NO.	ITEM	(1) OHIO	(2) TOTAL
1	GOODWILL	$	$
2	ABANDONED PROPERTY (Attach explanation)		
3	APPRECIATION.....(Attach explanation)		
4	OHIO AIR AND WATER POLLUTION CONTROL FACILITIES	57,179.00	57,179.00
5	TOTAL EXEMPTED ASSETS (Carry total of Col. 2 to Exhibit "D," Line 5)	$ 57,179.00	$ 57,179.00

Exhibit "D" - NET VALUE OF STOCK (FRANCHISE)

All corporations must complete this exhibit.

LINE NO.	ITEM	TOTAL
1	CAPITAL STOCK (Do Not Include Treasury Shares) (From Balance Sheet Lines 23 and 24)	$ 44,598,165.00
2	SURPLUS (From Balance Sheet Lines 25 and 26)	268,178,775.56
3	ADD RESERVES (Except Valuation Reserves Against Specific Assets)	
4	TOTAL NET WORTH (Carry to Form F-1, Line 1)	$ 312,776,940.56
5	LESS EXEMPTED ASSETS (Carry to Form F-1, Line 2)	57,179.00
6	NET VALUE OF STOCK (Carry to Form F-1, Line 3)	$ 312,719,761.56

Exhibit "E" - PROPERTY AND BUSINESS ALLOCATION (FRANCHISE)

Corporations having property or business allocated within and without Ohio shall complete this exhibit in arriving at the average Ohio percentage. Business shall be allocated on a destination basis. See Instruction Sheet Form 930A or Section 5733.05 R. C.

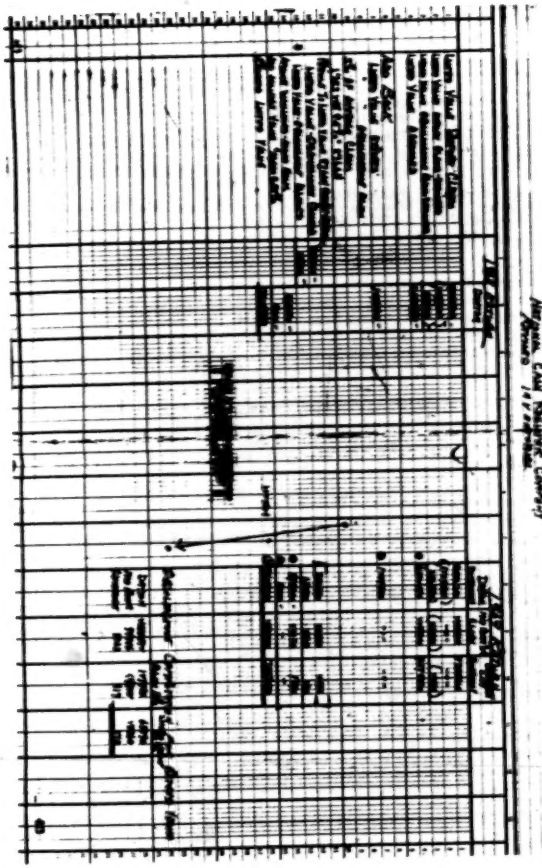
Corporations having property and business in Ohio only, need not complete Exhibit "E" as the net value of stock on Line No. 6 of Exhibit "D" shall be the taxable value and shall be carried forward to Form F-1, Line 5.

LINE NO.	ITEM	(1) OHIO	(2) TOTAL	(3) OHIO PERCENTAGE
1	PROPERTY (B/S Line 16 less Exhibit "C," Line 5)	$ 252,590,168 ÷	$ 678,169,118 =	37.2590 %
2	BUSINESS	$ 31,597,972 ÷	$ 630,299,530 =	5.01317 %
3	TOTAL PERCENTAGE (Line 1 plus 2)			42.25907 %
4	AVERAGE PERCENTAGE (1/2 Line 3) (Carry to Form F-1, Line 4)			21.12954 %

Exhibit "F" - QUESTIONNAIRE

1. Depreciation of Machinery & Equipment: Method STD. Life VBS
2. Net Income after Federal Income Taxes $ 26,233,000 1967, $ 27,219.00 1966
3. Total Number of Shares Outstanding (Exclusive of Treasury Shares) Com Pfd
4. Most Recent Sales Price, per common share (Tax Commissioner's Rule TX-41-10) $
   (Answer only when the shares are not income-producing)
5. Total Accumulated Dividends on Preferred Shares as of January 1, 1968 $

TRANSCRIPT



NATIONAL CASH REGISTER COMPANY
REVISED INVENTORIES
1968 AUDIT

DAYTON

	AMERICAN VALUE	LISTED VALUE @ 50%
AVERAGE INVENTORY - BOOKS CLAIMED	$2,333,000	$4,666,000
LESS 90% CLAIM - REPORTS	($1,650,000)	($3,300,000)
" " " @ RECONCILIATION	($ 300,000)	($ 600,000)
AVERAGE INVENTORY AS REVISED	$ 383,000	$ 766,000
ADD BACK		
AMERICAN VALUE EXCESS	$1,950,000	$3,900,000
COMPUTATION - RECONCILIATION		
AMERICAN VALUE - 90% CLAIM	$1,650,000	
ALLOW 5% OF AVERAGE ABOVE	$ 82,500	
AMOUNT CLAIMED	$1,732,500	
AMOUNT ALLOWED	$1,650,000	
ADD BACK TO AVERAGE	$ 82,500	$ 82,500
ADD SOURCE VALUE		$ 82,500
		$ 165,000

TRANSCRIPT

VS

Form 947

STATE OF OHIO
DEPARTMENT OF TAXATION

INTER-COUNTY CORPORATION CORRECTION NOTICE

68 PERSONAL PROPERTY TAX RETURN FILED BY: National Cash Register Company

PRELIMINARY AMENDED [ ] FINAL [X]

COUNTY	TAXING DISTRICT	TYPE	ITEM	LISTED VALUES AMENDED	LISTED VALUES PREVIOUSLY ASSESSED	INCREASE	DECREASE
MONTGOMERY	DAYTON	3	INVENTORY	69 679 910 /	63 150 910 /	1 471 700	
ASHTABULA	ASHTABULA	4	LEASED EQUIPMENT	116 240 /	3 070 /	113 170	
WASHINGTON	MARIETTA	4	"	1 820 /	-0-	1 820	
	Corrected - Final assessment certificate to be issued accordingly.						
	.....						
						1 616 370 /	

TRANSCRIPT

EXPLANATION: DISALLOW IN FULL EXPORT INVENTORY CLAIM
DISALLOW IN PART INVENTORY OBSOLESCENCE CLAIM
ADD LEASED EQUIPMENT

CLAIM
[X] ALLOWED IN PART
[ ] ALLOWED IN FULL
[ ] DISALLOWED

AUDIT: 1 [ ] 2 [ ] C [X]

EXAMINER: C. L. GREEN

DATE: 10-30-70

DATE ASSESSED: 11-9-70

46

(The amount of Ohio personal property tax assessed pursuant to this certificate was $49,872.90).

STATE OF OHIO
DEPARTMENT OF TAXATION

INTER-COUNTY CORPORATION
TANGIBLE PERSONAL PROPERTY

PRESCRIBED TAX FORM NO. 947-F

TAXPAYER'S NAME	ACCOUNT NUMBER	DATE	RETURN YEAR
NATIONAL CASH REGISTER COMPANY MAIN & K STREETS DAYTON, OHIO 45409	6739515	1/29/71	1968

FINAL ASSESSMENT CERTIFICATE OF VALUATION

TO THE AUDITOR - This is to certify that the Tax Commissioner has, pursuant to Sec. 5711.36, R.C., fixed the FINAL assessed value of tangible personal property of this company and apportioned it to your county as set forth below.

CO.	TAXING DISTRICT	TOTAL FINAL ASSESSED VALUE	TOTAL PREVIOUSLY ASSESSED VALUE	DEFICIENCY	PENALTY AND ADD. CHARGES	TOTAL DEFICIENCY	EXCESS
57	DAYTON	78,014,300	76,536,600	1,477,700		1,477,700	
	PER FINDINGS OF FIELD AUDIT CLAIM FOR DEDUCTION ALLOWED IN PART THIS FINAL ASSESSMENT AUTHORIZED BY THE TAX COMMISSIONER ON JANUARY 29, 1971 AMENDS ASSESSMENT OF AUGUST 7, 1968						

ALL OTHER VALUES PREVIOUSLY ASSESSED REMAIN UNCHANGED

NOTICE TO TAXPAYER - In the event of any objection to any deficiency or excess, Petition on Appeal (Sec. 5717.02 R.C.) must be filed with the Board of Tax Appeals within thirty days after mailing of this notice. Remit to County Treasurer upon receipt of bill based on values above.

TAX COMMISSIONER'S COPY

TRANSCRIPT

51

TAX COMMISSIONER

BEFORE THE BOARD OF TAX APPEALS
DEPARTMENT OF TAXATION
STATE OF OHIO

THE NATIONAL CASH REGISTER COMPANY,
Main & K Streets,
Dayton, Ohio 45409,

Appellant,

vs.

ROBERT J. KOSYDAR,
Tax Commissioner of Ohio,
68 East Gay Street
Columbus, Ohio 43215,

Appellee.

Case No. 71-020330

NOTICE OF APPEAL

Pursuant to Section 5717.02, of the Revised Code of Ohio, The National Cash Register Company, hereinafter "NCR", gives notice of its appeal to the Board of Tax Appeals, from a Final Assessment Certificate of Valuation for Montgomery County, issued with respect to Ohio Personal Property tax return year 1968, and bearing the date of January 29, 1971. A true and correct copy of the Certificate is attached hereto, made a part hereof, and incorporated by specific reference. Such Certificate is erroneous, in that it:

(1) Disallows a claim for reduction from Schedule 3, of idle, obsolete and unsaleable inventory (identified as Account No. 322530). Such inventory consists of used machinery, originally manufactured by NCR, and subsequently returned to it for various reasons. The Tax Commissioner erred by assessing such inventory in excess of its true value in money. See Section 5711.18 of the Revised Code of Ohio.

(2) Disallows a claim for reduction from Schedule 3, of inventory held for export. Such inventory consists of new machines, manufactured by NCR solely for export. The Tax Commissioner erred by assessing such inventory in violation of Article I, §10, Clause 2, of the Constitution of the United States.

Because of the errors stated above, NCR requests that the Commissioner's determinations be reversed as unreasonable and unlawful, and that final judgment be entered in its favor.

Respectfully submitted,

THE NATIONAL CASH REGISTER COMPANY
CARLTON S. DARGUSCH, JR.
L. ORIN SLAGLE, JR.

DARGUSCH & DAY
218 East State Street
Columbus, Ohio 43215
Its Counsel,

and

JAMES E. RAMBO
Vice President, Secretary and
General Counsel

CHARLES E. MARTIN
Director, Corporate Taxes

(Certificate of Valuation Omitted)

BEFORE THE BOARD OF TAX APPEALS

No. 71-02-0330

THE NATIONAL CASH REGISTER COMPANY,
Appellant,

vs

ROBERT J. KOSYDAR, TAX COMMISSIONER,
Appellee.
34 North High Street
Columbus, Ohio 43215
August 5, 1971.

Met, pursuant to assignment, at 9:30 a.m.

BEFORE:

CHARLES HENDERSHOT, Attorney Examiner for the Board of Tax Appeals, Department of Taxation, State of Ohio.

APPEARANCES:

L. ORIN SLAGLE, JR., and ROGER DAY, of the firm of Dargusch and Day, 218 East State Street, Columbus, Ohio 43215, appearing on behalf of the Appellant.

WILLIAM J. BROWN, Attorney General, by PETER STRATIGOS, Assistant Attorney General, 71 East State Street, Columbus, Ohio 43215, appearing on behalf of the Appellee.

INDEX

WITNESSES:	Direct	Cross	Redirect
Andrew S. Gillen	9	47	
Charles Harman	60	64	70

EXHIBITS:	Identified	Received
Appellant's Exhibit No. 1	12	60
Appellant's Exhibit No. 2	15	60
Appellant's Exhibit No. 3	19	60
Appellant's Exhibit No. 4	25	60
Appellant's Exhibit No. 5	28	60
Appellant's Exhibit No. 6	29	60
Appellant's Exhibit No. 7	31	60
Appellant's Exhibit No. 8	38	60
Appellant's Exhibit No. 9	63	60

(Page 1)

PROCEEDINGS

Examiner Hendershot: This is before the Board of Tax Appeals, Department of Taxation, State of Ohio. The National Cash Register Company, Appellant versus Robert J. Kosydar, Tax Commissioner, Appellee. Case No. 71-02-0330.

This matter is being heard in the hearing room of the Board of Tax Appeals, 34 North High Street, Columbus, Ohio, on August 5, 1971, at 9:30 a.m., pursuant to assignment, before Charles Hendershot, Attorney Examiner for the Board of Tax Appeals.

The notice of tax appeal in this matter was filed with the Board of Tax Appeals on February 23, 1971, and is from a final assessment certificate of valuation dated January 29, 1971, for the tax return year 1968 in which a deficiency was found in the amount of $1,477,700.

Would counsel for the Appellant please enter his appearance?

Mr. Slagle: May it please the Board, we are Roger F. Day and Orin L. Slagle, Jr., of the firm of Dargusch and Day, 218 East State Street, Columbus, Ohio 43215.

Examiner Hendershot: Very well. (Page 2)

On behalf of the Appellee.

Mr. Stratigos: William J. Brown, Attorney General, by Peter A. Stratigos, Assistant Attorney General, 71 East State Street, Room 218, Columbus 43215.

Examiner Hendershot: Very well.

Now, Mr. Slagle, do you have a brief opening statement of what you expect to prove by the evidence which you will present to us this morning?

Mr. Slagle: Thank you, Mr. Hendershot.

The case this morning involves 1968 personal property tax return of National Cash Register Company. Through-

out this presentation we will no doubt refer to the National Cash Register Company as NCR.

The appeal is from a final assessment of personal property tax made by the Tax Commissioner on January 29, 1971. In that final assessment, he allowed a part of a claim which will not be involved in this appeal. The Tax Commissioner disallowed two major claims made by NCR. One claim related to NCR's unbettered or obsolete inventory, and the second involved a claim related to NCR's international inventory.

Both claims were for deductions from book value. Exceptions in the form of a notice of appeal to this Board were taken to the Tax Commissioner's decision. NCR claimed in its notice of appeal to this Board that **(Page 3)** it was an error for the Tax Commissioner to have disallowed its claims related to its unbettered or obsolete inventory, and a second error is claimed that it was erroneous for the Tax Commissioner to disallow its deduction from book value related to its international inventory.

The case this morning will proceed only on this second matter. We will not contest for the 1968 tax year the Commissioner's disallowance of the claim for deduction from book value for the obsolete or unbettered inventory. We will, however, present evidence which we believe will pursuade this Board that it was erroneous for the Tax Commissioner to have disallowed NCR's claim from book value for its international inventory.

Two witnesses will be presented by NCR. The first will give evidence concerning the nature of the items which comprise NCR's international inventory account. His evidence will be that each and every item included within that international inventory is an item which has been irrevocably committed to exportation.

The second witness will give evidence concerning value of items coming from its international inventory account.

The witnesses are in attendance, sir, and we **(Page 4)** are prepared to proceed.

Examiner Hendershot: Very well, sir.

On behalf of the Appellee?

Mr. Statigos: It will be the position of the Tax Commissioner and the Tax Commissioner expects the evidence to show that the assessment is correct according to law and therefore must be affirmed.

Examiner Hendershot: Very well. Call your first witness.

Mr. Slagle: Call Mr. Andrew S. Gillen.

Examiner Hendershot: Come around forward, please, and be sworn. **(Page 5)**

Andrew S. Gillen,

being first duly sworn as prescribed by law, was examined and testified as follows:

Direct Examination

By Mr. Slagle:

Q. Will you please state your name and address? A. Andrew S. Gillen, Main and K Streets, Dayton, Ohio 45409.

Q. Mr. Gillen, by whom are you employed? A. National Cash Register Company.

Q. How long have you been employed by the National Cash Register Company? A. For thirty years.

Q. What is your present title or position with NCR? A. Vice President, International Administration.

Q. How long have you had that title, sir? A. This is my fifth year.

Q. By the way, are your offices located in Dayton, Ohio? A. Yes, they are.

Q. Please describe for the Board your duties as Vice President of International Administration. A. I am responsible for the worldwide administration **(Page 6)** and financial matters of The National Cash Register Company.

Q. Did National Cash Register maintain an inventory of items destined for exportation at Dayton, Ohio?

Mr. Stratigos: I object to the use of the term "exportation, export," or anything of that nature, since there are legal conclusions attached to that term.

Examiner Hendershot: He may answer that question. The objection is overruled.

The Witness: Yes.

By Mr. Slagle:

Q. Did NCR maintain inventories of items destined for exportation in any other location other than Dayton, Ohio, within the State of Ohio? A. No.

Q. Are the records related to that inventory maintained under the custody and control of individuals over whom you exercise direct supervision? A. Yes.

Q. Is Mr. Charles Harman one of those individuals? A. Yes.

Q. And prior to the time that you were named Vice President of the International Administration, what position did you have with NCR? **(Page 7)** A. I was President of NCR, Canada.

Q. Is that a subsidiary of NCR? A. Yes, totally owned subsidiary.

Q. As President of the Canadian subsidiary, were you related to matters concerning international sales? A. To a limited degree.

Q. Were you familiar with NCR product lines for international sale? A. Also to a limited degree.

Q. Now, Mr. Gillen, is there some separation of the international operation of NCR from its other operations? A. There is total separation.

Q. Is the international operation separately incorporated? A. No.

Q. Please describe the degree of separation that exists with respect to the international operation. A. In the marketing of our business machine products, there are two main divisions of the National Cash Register Company. One is known as domestic marketing and the other is known as international marketing. Each of these divisions is headed up by a group Vice President who reports directly to the President of the company. **(Page 8)**

Q. Does the international division have its own accounting staff? A. It does.

Q. Does the international division have its own sales force? A. It does.

Q. Does the international division have its own product lines? A. Yes, combined with some items from domestic.

Q. Is the international division housed in a separate facility? A. Yes.

Q. Now, with respect to products that are packaged for departure from the plant or warehouse, does the international division have an identifiable packaging? A. Yes.

Q. With respect to inventory, do you have your own record control system? A. Yes.

Q. With respect to 1967, did the international division have its own separate record control system? A. It did.

Q. Now, Mr. Gillen, I want to ask you a series of questions concerning the manner in which an **(Page 9)** international sale is made. A. All right.

Q. First, what products are sold to foreign purchasers that might be warehoused at Dayton prior to their ex-

portation? A. Cash registers, accounting machines, and EDP, peripheral equipment.

Q. Now, can you describe for the Board what the meaning of the latter designation is? A. Yes, EDP peripheral equipment is basically items which are used to form a total electronic data processing system, or a computer system.

Q. All right.

Is there any difference in the manner of an international sale because of the product sold; that is, does the manner of the sale change depending upon whether the item sold is a cash register, an accounting machine, or an electronic data processing equipment? A. There is no difference.

Q. Let us assume that a cash register is being sold to a foreign consumer. Is there further designation of a cash register which will make your description of the sale more meaningful? A. Yes. All of our cash registers have individual model designations. Most of the machines **(Page 10)** sold in the international division have been designed for the particular country that it is going into, and things are so designated by the model number.

Q. Do you have class designations as well as model designations? A. Yes.

Q. Do you have a Class 5 cash register? A. Yes, we do.

Q. All right, let us assume we are talking about a Class 5 cash register. In how many countries would Class 5 registers be marketed by NCR? A. We are currently doing business in one hundred twenty countries of the world and roughly eighty percent of those countries would market the Class 5.

Mr. Slagle: I ask that this be marked as Appellant's Exhibit No. 1 for identification, sir.

Whereupon, Appellant's Exhibit No. 1 was marked for purposes of identification.

By Mr. Slagle:

Q. Now, I hand you, sir, what has been marked as Appellant's Exhibit No. 1 for identification and ask you whether or not you can identify that document? A. Yes, I can. This is a list of the countries **(Page 11)** where we have subsidiaries throughout the world. There are seventy-two on this and it is divided into eight regions.

Q. Now, are those all the countries in which you do business? A. No, these are countries where we have headquarters.

Q. All right, sir.

Now, are there possessions or territories listed on this Appellant's Exhibit No. 1 for identification. A. Yes, one. Puerto Rico.

Q. Is that the only possession or territory in which you make sales? A. No.

Q. What other possessions or territories do you make sales in? A. Guam is the only one I think of offhand.

Q. Did you determine what the percentage of international sales to possessions or territories represents? A. This would be a rough estimate, but I would say —

Mr. Stratigos: Objection. The witness has already said it would be a rough estimate. Obviously he is speculating. **(Page 12)**

Examiner Hendershot: He may give his estimate. He stated it would be a rough estimate and it will be considered in that light.

He may answer.

The Witness: I would also say this would be a rather intelligent answer based on a great deal of information about the operation of our business. My estimate is that

our business to possessions is less than one percent of our total business.

By Mr. Slagle:

Q. Now, Mr. Gillen, is there any reason to believe that the percentage of goods destined for possessions or territories located in warehouses in Dayton is in excess of one percent of the total goods warehoused? A. There is no reason.

Q. All right, sir.

Now, might classified cash registers be sold in any of the countries appearing on Appellant's Exhibit No. 1 for identification? A. Yes.

Q. Might a Class 5 register be sold to a person in Japan? A. Absolutely.

Q. Would the manner in which the transaction, that is to say the sale occurred, vary substantially **(Page 13)** because of the ultimate country to which the Class 5 cash register was to be delivered? A. No.

Q. Please describe generally what takes place when a salesman of Class 5 registers calls upon a prospective Japanese purchaser. A. The first thing that the salesman would have to do, of course, is to get the customer's interest and secure the permission of the customer to discuss his business with him, with the ultimate objective of being able to make a detailed survey of the customer's business to find out if there was a need for our product.

Once that need had been established, the salesman would decide how best to take an NCR product, and I think you mentioned the Class 5, and build that product to meet the customer's individual requirements in Japan.

Q. Before we go any further, Mr. Gillen, I want to ask you a few questions.

What is the relation of a Class 5 cash register to the other cash registers that have been made by NCR? A.

Well, the Class 5 represents the latest and newest product that the National Cash Register Company makes in the cash register field. It is also the most **(Page 14)** sophisticated machine produced. It is probably the most advanced machine produced by any cash register manufacturer in the world, and it, of course, is a generic term referring to one particular class of machine. A. Yes.

Q. And did NCR produce Class 5 cash registers for the international division during 1967? A. Yes.

Q. Now, except for its sophistication, is there any reason to distinguish this Class 5 cash register from other cash registers that were part of the international inventory during 1967? A. No.

Q. All right, sir.

Now, returning to the matter of the sale of a Class 5 cash register to a Japanese customer, what would be the first document to arrive at NCR indicating that a machine was to be manufactured for sale to the Japanese purchaser? A. An order equipment form.

Mr. Slagle: I am going to ask, sir, that this document be marked as Appellant's Exhibit No. 2 for identification.

(Page 15)

Whereupon, Appellant's Exhibit No. 2 was marked for purposes of identification.

By Mr. Slagle:

Q. I hand you what has been marked as Appellant's Exhibit No. 2 and ask you whether or not you can identify this document. A. Yes, this is an equipment order which was placed on August 28, 1970, by National Cash Register's Japanese subsidiary for a Class 5 cash register.

Q. Have you ascertained whether or not there is any difference in the form as used in 1970, as opposed to the

form used in 1967? A. To the best of my knowledge, there isn't any.

Q. All right, sir.

Now, directing your attention to this exhibit, being Appellant's Exhibit No. 2 for identification, I notice that there is a number which appears below the word "model."

Will you please state for the Board the meaning of that number? A. Yes. The first digit indicates the class of machine, which happens to be a Class 5. The next group of numbers which are in the brackets indicates the individual model number. The series of numbers **(Page 16)** following the model number indicate the basic construction of this individual machine, and when I refer to basic construction, I am talking about how the individual keys function to add, subtract, multiply, add into one total, subtract from another, et cetera.

Q. Does the model number in any way indicate that the machine to be produced might be consumed by a foreign customer? A. Yes, the group of numbers in the brackets happens to be a size number that is made only for the international division.

Q. All right, sir.

Now, would this order form be submitted to NCR at its offices in Dayton, Ohio? A. Yes, it would.

Q. Where, by the way, are classified cash registers produced? A. They are produced in two plants in Ohio. Dayton, Ohio, and Cambridge, Ohio.

Q. Irrespective of where the cash register was to be produced, would the order come to Dayton? A. Yes.

Q. Were you producing cash registers in Cambridge, Ohio, in 1967? A. I would say we were just starting, but primarily all cash registers were produced in Dayton **(Page 17)** at that time.

Q. All right, sir.

Would the National Cash Register Company, either at Dayton or Cambridge, have a cash register already constructed and built to meet this order at the time the order arrived? A. No.

Q. To whom does the form indicate that the Class 5 registers are to be shipped? This is an order for more than one, isn't it? A. It is for one hundred seventy, yes.

Q. To whom are they to be shipped? A. Japan NCR, Limited.

Q. Is that a subsidiary of NCR? A. Yes.

Q. Is it wholly owned? A. No, seventy-thirty subsidiary.

Q. Are there other NCR subsidiaries that are not wholly owned? A. Yes.

Q. Who owns the thirty percent, Mr. Gillen? A. This is owned by individual stockholders in Japan. Our stock is listed on the Tokyo Stock Exchange.

Q. Who owns the seventy percent? A. NCR, Dayton, Ohio. **(Page 18)**

To the right of the "ship to" entry on Appellant's Exhibit 2 for identification there appear to be questions concerning payment. Please describe the meaning of the various entries that might be made in this portion of Appellant's Exhibit No. 2 for identification. A. The method of payment, first of all, is determined by the country to which the equipment is going to be shipped.

We could have a sight draft. We could have a letter of credit. We can ship to an open account or we can have a deferred account.

Perhaps you might want to know why we have these different classifications.

Q. Yes, sir. A. Many countries today have serious foreign exchange problems. An example might be with

Argentina. In Argentina, whenever you have an equipment order that is for more than $10,000, if you wish to export from the United States, you must grant deferred terms. Depending on the magnitude of the order above $10,000 determines the number of months that you have to give credit which can go up to three or four years. This would be known as a deferred account. **(Page 19)**

We have other countries where they have serious balance of payment problems. For instance, the Philippines is one that comes to mind. There, until the Central Bank authorizes a letter of credit and import license, you cannot ship the equipment. We would say, therefore, in that case it was a letter of credit.

We have other countries that require a sight draft, again, as a method of controlling the balance of payment.

Then, we have other accounts in other countries where an ample balance of payment problem does not exist and we simply ship and bill the customer. That would be an open account.

Q. Were there balance of payment problems during the year 1967? A. To my knowledge, there have been balance of payment problems throughout the world in our association with any other country.

Q. All right, sir.

Who would be responsible for completing the responses to various blanks and squares on that portion of Appellant's Exhibit No. 2 for identification which relates to the payment? A. The International Order and Shipping Department.

Q. All right, sir. **(Page 20)**

Is that located at Dayton, Ohio? A. Yes, it is.

Q. All right.

Now, below the matter that we have here that has reference to a pro forma invoice, what is the meaning of

that, please? A. In many countries, before they will issue an import license, or a letter of credit, you must submit an invoice showing the type of equipment that is going to be shipped into the country and its pricing.

Once that has been done, no deviation of any kind can be made in the actual shipment or the license would be void.

Q. So, is an invoice sent to that country in advance of the time that the machine is manufactured? A. Yes, well in advance, and it is marked "pro forma invoice."

Q. All right, sir.

Now, what would be the next document related to the sale of a Class 5 cash register to a Japanese consumer? A. The next would be the individual building construction sheet which would tell them how this machine was to be built.

Mr. Slagle: I am going to request that this **(Page 21)** document be marked as Appellant's Exhibit No. 3 for identification.

Whereupon, Appellant's Exhibit No. 3 was marked for purposes of identification.

By Mr. Slagle:

Q. I hand you what has been marked as Appellant's Exhibit No. 3 for identification and ask you whether or not you can identify that document? A. Yes, I can. It is a building construction sheet for Japan that covers a model—Class 5 cash register, Model 700-20.

Q. Is this obviously a copy? It is, is it not? A. Yes.

Q. Where is the original of that document? A. The original would be in the files of the National Cash Register Company in Dayton, Ohio.

Q. Are these building construction documents maintained regularly by NCR? A. Yes, they are.

Q. All right, sir.

Now, then, again, I notice in the upper left-hand corner, there is a designation "Model No." Will you tell the Board the meaning of that, please? **(Page 22)** A. Again, this is a Class 5 cash register, Model 700-20 which is built exclusively for Japan, and it has individual functions which are described in the series of numbers following the model number.

Q. By the way, who is responsible for completing this document? A. This document is prepared by the individual salesman in the country with assistance from technical people in that country.

Q. And would it be a part of the documentation that is sent to NCR with the international equipment ordered? A. Yes. In fact, no order is acceptable without the building instruction sheet.

Q. All right.

Now, how can you tell, sir, from looking at Appellant's Exhibit No. 3 for identification that this calls for the manufacture of a cash register to be sent to Japan ? A. Well, first of all, the Model 700-20 would tell us that this was an international model. Also, when you see the Chinese characters which appear on this product —this billing instruction sheet, this would also indicate it is going to the Far East. The construction form itself says, of course, Japan. **(Page 23)**

Q. Now, I want to look in the center panel of Appellant's Exhibit No. 3 and to the left of the document. There are a number of column amounts and amount rows. Do you see those, sir? A. Yes.

Q. What is the meaning of that? A. This is the keyboard that is used to record a yen. This particular key-

board is different than you would find on a register used, for instance, in the United States.

You will note that there is no decimal point after the second—between the second and the third column. You will note that the decimal point will appear after the third column.

The reason for this is that in recording yen, there are no fractions. There are 350 yen to a dollar, so everything is to the left of the decimal point and instead of using a comma, they use a decimal point to set off the third and fourth row.

Q. How large a transaction in yen is this machine capable of recording? A. This machine is capable of recording ninety-nine million yen.

Q. And assuming now that we had a transaction where we were disregarding the cents, since there is no (Page 24) decimal point, what size transaction would this machine record if it were used in the United States? A. $999,000.

Q. I think I mislead you there.

Assume now the total absence of a decimal point and any reference to cents, what would be the size of the transaction? A. Well, then, you would have the ninety-nine million capacity.

Q. All right, sir.

Do you know of any domestic consumer who wants a machine of that capacity?

Mr. Stratigos: Objection.

Examiner Hendershot: He may answer if he knows.

The Witness: It would be impossible to have such an application in this country.

By Mr. Slagle:

Q. All right. Assuming the decimal point, what would be the magnitude of the transaction to be recorded? A. $999,000.

Q. All right, sir.

Now, I want you to look at that portion of Appellant's Exhibit No. 3 for identification which is denominated Row 2, key caption. Do you see that, sir? A. Yes. **(Page 25)**

Q. What is the meaning of the entry that appears below that in that column? A. Unfortunately, they are using Chinese characters and I cannot interpret that for you.

Q. What does that indicate to NCR is to be done as far as building construction is concerned? A. The function of these keys is described in the lower left-hand side of the form and also in the center middle, and this is done by a numerical expression and these numbers, or the function of these keys, are put into a computer and the computer actually designs the specially constructed parts that are required to meet this individual application.

Q. Now, the key caption itself, would that indicate that on the keys, if I were to look at the cash register produced pursuant to this particular document that those keys would have those characters on them? A. They would.

Q. Now, is there anything there that indicates what the pressing of that key would cause to be printed, if anything, on any tape? A. Yes. In the caption in the third row to the left where it says, "Key caption," it says, "Print," and it also prints the characters as you see them listed.

Q. All right, sir. **(Page 26)**

Now, then, do cash registers have what are known as indicators? A. Yes, they do.

Q. What is an indicator? A. The indicator is the amount that appears in the window that you see in the cash register to my right.

Q. All right, we will ultimately have some pictures to show that. Are you speaking now, sir, of the glassed portion at the top of the cash register? A. I am.

Q. All right.

Now, at the time that this was received at Dayton, Ohio, is it known by those who look at this that such a machine can, in fact, be built or manufactured? A. Basically, yes, because of the model number 700-20 which tells the person reviewing this that the basic model has been built and proven for the Japanese market.

Q. Now, with respect to the peculiar modifications that are required by the numbers, you have testified appearing in the lower left-hand side of Appellant's Exhibit No. 3 for identification, how do you test out whether or not those modifications can be made? A. This can only be done by a computer because, by simply changing the function of one key, it affects **(Page 27)** the mechanism of the entire machine.

Q. All right, sir.

Now, does Appellant's Exhibit No. 3 for identification give you any indication of the kind of motor or electrical current that the machine is to be wired for? A. Yes, it does. It is for an AC current, 100—

Q. Volt? A. —volt. I couldn't think of the word. It is sixty cycles.

Q. Is the AC current in the United States standard at one hundred volts? A. No, sir, it is 110-120.

Q. Is it standard at 100, 60 cycles? A. No, it depends on the country where the machine happens to be installed. Japan has some sixty cycle and also some fifty cycle.

Q. What would happen to a machine designed for AC current of 100 volts if it were plugged into an outlet with 110 volts?

Mr. Stratigos: Objection. There is nothing showing that the witness is an electrical engineer or has any knowledge of this area.

Examiner Hendershot: He may answer, again, if he knows. **(Page 28)**

The Witness: I do know. I have been in this business over thirty years. It is just a basic question.

If you were to plug it in, you would ultimately burn the motor out, so you couldn't use it.

By Mr. Slagle:

Q. Are there countries that require you to employ fifty cycle motors? A. Yes.

Q. What country besides Japan might require the use of such a motor? A. Almost all of the Latin American countries and many of the European countries.

Q. Now, what would happen to a machine if it were equipped with a fifty-cycle motor and it was plugged into a current with sixty cycles? A. Well, as long as the machine would operate it would operate until you burned the motor out. You would get a very, very slow operation, and more than likely, you would make the machine add wrong, because of the change of the cycling time.

Q. Would that be true of an accounting machine as well as a cash register? A. This would be true of any mechanical device driven by an electric motor. **(Page 29)**

Q. And, therefore, this would be true of electronic data processing equipment? A. Yes, sir.

Q. Below what you have been testifying about, namely, AC current and cycles, there appears the question, "Tropical," and the answer, "Yes." What is the meaning of that? A. In certain climatic conditions where it is very humid, you must have a tropical motor. This is a specialized motor and very much more expensive than a motor to be placed in the United States. It is made to withstand extreme heat and humidity.

Q. What would be the next document involved in the purchase and manufacture of the machine for sale to a Japanese consumer? A. After the building construction sheet from the country has been reviewed and it has been ascertained that this machine, in fact, can be built as specified, then a factory work order card is made up.

Mr. Slagle: I will ask this document be marked for identification as Appellant's Exhibit No. 4.

Whereupon, Appellant's Exhibit No. 4 was marked for purposes of identification. **(Page 30)**

By Mr. Slagle:

Q. Now, sir, I am going to hand you what has been marked as Appellant's Exhibit No. 4 for identification and I am going to ask you whether or not you can identify that. A. Yes. This is a factory work order for a machine. It is a Class 5. It happens to be a Model 241-27.

Q. All right, sir.

Now, can you, from looking at Appellant's Exhibit No. 4 for identification, tell where this machine is to be used? A. It has the National Model No. here indicated as 241-17, but without referring to an individual order, I would have to go entirely by the symbol, and the symbols are Chinese. Therefore, I would assume it is Japan.

Q. How could you determine if you only had Appellant's Exhibit No. 4 for identification before you who had ordered this machine? A. Well, there is a tracer number assigned to this particular order. It happens to be No. 75176M, and that is the identifying number of this product going through our production.

Q. And can you use that number to make a connection between Appellant's Exhibit No. 4 for identification, and **(Page 31)** an equipment order? A. Yes. This can be cross referenced to a specific order number and customer.

Q. Now, with respect to sales by international division during 1967, beginning in 1967 and thereafter, is there a factory work order covering every machine that is manufactured? A. Yes, there is.

Q. And are these maintained or preserved? A. Yes, they are.

Q. And where are they maintained or preserved? A. In Dayton, Ohio.

Q. Now, are the international equipment orders maintained or preserved? A. Yes.

Q. And where are they maintained or preserved? A. Dayton, Ohio.

Q. If I were interested in determining the order and seeing the factory order equipment production order card for each machine that was warehoused during 1967 by the international division, could you make those documents available to me? A. Yes.

Q. Would those documents be similar in appearance to Appellant's Exhibit No. 1 for identification which **(Page 32)** you have identified as being an international equipment order and Appellant's Exhibit No. 4 for identification which you have identified as being a Class 5 production order? A. They would be identical.

Q. Do you have an equipment production order for accounting machines? A. Yes, we do.

Q. Do you have an equipment production order for electronic data processing equipment? A. Yes, we do.

Q. And do you maintain or preserve those forms in the same fashion that you have previously testified? A. Yes, we do.

Q. Now, is there some relationship between the equipment production order from which is Appellant's Exhibit No. 4 for identification and the building instruction card which is Appellant's Exhibit No. 3 for identification? A. Yes, directly related.

Q. What is that relationship? A. The factory work order card or production card takes what I would consider layman's language and it turns it into production language so the factory knows how to proceed to build the machine. **(Page 33)**

Q. Now, where is the factory order card, Appellant's Exhibit No. 4 for identification, kept during the production of the machine? A. It is on the machine the entire time, on the main frame.

Q. If a person who had made an international equipment order came to Dayton during the time that the machine was being manufactured, could you find in the manufacturing process for him that machine which he ordered? A. Yes. We would know exactly what job it was on throughout the entire production procedure. When I refer to job, it is Job No. 1, No. 2, or No. 3, as it goes down the assembly line.

Q. Who would be responsible for the completion of the various data required to complete Appellant's Exhibit No. 4 for identification? A. This is prepared by the order production scheduling department which is under the manufacturing control.

Mr. Slagle: Sir, at this time, if it pleases the Board, we would like a ten-minute recess. We have a problem with one of our exhibits that can be taken care of in ten minutes.

Examiner Hendershot: Very well, we will take **(Page 34)** ten minutes.

(Short recess.)

Examiner Hendershot: All right, you may proceed.

Mr. Slagle: Thank you, sir.

By Mr. Slagle:

Q. After the cash register was produced pursuant to Appellant's Exhibit No. 4 for identification, what would next happen to it? A. It would go to final inspection and

after it was determined that the cash register, in fact, had been built as specified on the factory work order card, it would then go to packing and would be packed for export shipment.

Q. Now, is there anything distinctive about export packaging? A. Yes, there is.

Q. Are you familiar with the kind of packaging that is used by National Cash Register for goods to be shipped outside the country? A. Yes, I am.

Q. All right.

Mr. Slagle: May this be marked as Appellant's Exhibit No. 5 for identification, Mr. Hendershot? **(Page 35)**

Whereupon, Appellant's Exhibit No. 5 was marked for purposes of identification.

By Mr. Slagle:

Q. I hand you what has been marked as Appellant's Exhibit No. 5 for identification and I will ask you whether or not you can identify what that document is. A. Yes. This is a piece of equipment designed or made for export shipment.

Q. All right, sir.

Now, with respect to this particular exhibit, how do you know that that is designed for export shipment? A. By the crating.

Q. And the crate is made of what, sir? A. It is made of wood, reinforced with wire bands and steel straps.

Q. Now, is it necessary to protect the machine from moisture? A. Yes. If you will notice, underneath or in the openings in the side, you can see the piece of equipment is sealed in a very heavy plastic, tight, moisture-proof cover.

Q. Now, how does that packaging differ from packaging for a machine to be sold within the United (Page 36) States? A. Most of the equipment sold in the United States is packaged in cardboard cartons.

Q. Is it necessary to protect it from moisture? A. Not to the degree that it is on export shipment. Sometimes under export shipment, they actually wind up on the deck. It is deck cargo and they don't even go into the hold.

Q. Does an item destined for an export customer and exported ever find its way back into the United States? A. No, never.

Q. All right, Mr. Gillen.

Mr. Slagle: I ask that this document be marked as Appellant's Exhibit 6 for identification.

Whereupon, Appellant's Exhibit No. 6 was marked for purposes of identification.

By Mr. Slagle:

Q. I hand you what has been marked as Appellant's Exhibit No. 6 for identification and ask you whether or not you can identify that. A. Yes. This is a piece of sales promotional material prepared in Japan for the Class 5 register and (Page 37) specifically for the Japanese model of the Class 5, 201-15.

Q. I want you to turn to what would be the third page of the brochure and I ask you whether or not that is a picture of what a Class 5 cash register produced for a Japanese purchaser might look like. A. It is.

Q. Now — A. I was going to say I might particularly call your attention to the reason I can immediately identify it is because on the identification, you see where a

decimal point is used between the third and fourth column which is used in lieu of a comma and you will note there is no decimal point to the right of the figures.

Q. All right, now, I notice in that photograph a series of keys which are lettered A through N. Is that correct? A. Yes.

Q. Immediately to the right of those keys, I see a series of rows of keys which are numbered in ascending column from 1 through 9. Is that correct? A. Yes.

Q. Now, what would be the function of those keys? A. This is the amount keyboard which would **(Page 38)** facilitate recording 999,999 yen.

Q. All right, sir.

Now, is that the same number of amount keys that were called for in the factory work order card which was Appellant's Exhibit No. 4 for identification? A. Yes.

Q. Now, assuming that this cash register was, in fact, prepared to be marketed in Japan, would the arabic symbols appear 1 through 9 on that cash register? A. They would.

Q. Now, then, to the right in the photograph I notice that there are a series of keys which, in a descending order, are numbered in the first row 1 through 9 and the second row 10 through 18. Do you see those sir? A. Yes, I do.

Q. Would those keys appear in that fashion in a cash register prepared for a Japanese consumer? A. Not normally. What we are trying to indicate here is that we can custom build this machine for a Japanese consumer and this is simply numbering the positions which are available for custom construction.

Q. All right, what would one expect to find on those particular keys? A. Normally, you would find a Chinese character **(Page 39)** designating the key and its function.

Q. Now, again, directing your attention to what you have identified as being the six rows of amount keys, are you familiar with the number of amount keys that would normally appear on a model of a Class 5 cash register for a continental United States customer? A. I am.

Q. How many would there be? A. Normally four, and a maximum of five.

Q. And that would allow the record of what? A. Ascending item in a purchase of $99.99. There would be no limit to the total number of purchases.

Q. All right.

With respect to the single item purchase on a five-row of keys cash register? A. Single item then would be $999.99.

Q. All right.

Mr. Slagle: Now, if it please the Board, I am going to ask that this be marked as Appellant's Exhibit No. 7 for identification and I am going to ask for permission to have a series of photographs taken for the record after the illustrations made by Mr. Gillen.

Examiner Hendershot: All right, we will refer to that as Exhibit 7 without putting a mark on it. **(Page 40)**

Whereupon, the document above referred to was identified as Appellant's Exhibit No. 7.

By Mr. Slagle:

Q. I want you to look at Appellant's Exhibit No. 7 for identification and tell me whether or not you can identify this. A. Yes, it is a Class 5 cash register built for the International Division.

Q. All right, sir.

How do you know it was built for the International Division? A. By prior inspection of it during the break.

Q. Do you want to come over here, Mr. Gillen, and will you point out for the Board the amount keys? A. Yes. There are $99.99, or in this particular case, it happens to be marked pfennigs because it is a German constructed machine.

Q. How do you know, sir, that this is a German constructed machine? A. It happens to have the German characters on it.

Q. All right, sir.

Now, then, how many rows of amount keys do you find on this particular machine? **(Page 41)** A. Four.

Q. And then there are a series of keys that are numbered 1 through 9 to the right on the keyboard of the amount keys, is that correct? A. That is correct.

Q. Now, what function do those keys perform? A. At this point, without knowing the particular application, I am going to have to give an assumption. I would assume that these are department identification, numerical department identifications.

Q. They might serve that function? A. That is correct.

Q. All right.

Then, there are keys on here that have words. Are you familiar with the German language? A. No, I am not.

Q. All right. Do those appear to be written in a foreign language? A. They are.

Q. All right.

Then, to the right of those are a series of keys and some symbols connected with those. What are those, sir? A. They are the control keys that enables you to, at the end of the day or during the day, to determine **(Page 42)** what business has been done in each of these various classifications.

Q. All right.

Now, finally, across the bottom row, we find a series of keys that are numbered consecutively 12 through 2, is that correct? A. That is correct.

Q. What are those keys for? A. These are unit control keys so that if I sell three items in Department 7, the machine will automatically catalog the cost of it and will down here record the number of the items sold in this particular category.

Q. All right.

Now, then, is this machine—by the way, let's identify the matter of the indicator.

You previously spoke of an indicator and talked about the glass portion. Is this at the top of the machine? A. Yes.

Q. And is the indicator that which appears in the extreme right? A. Yes.

Q. What would appear here in these two blocks? A. The department classification and the German symbol indicating the amount charged so the customer **(Page 43)** would be able to know or follow the transaction as it was recorded.

Q. All right.

With respect to the use of this machine without any change whatsoever, in Japan, let's say, what would be the maximum purchase that could be recorded on this particular machine in Japan? A. Here we would have nine thousand yen.

Q. All right. That would be the equivalent of a purchase of how much in dollars? A. Excuse me, that is 90,000, I am sorry.

There are 350 yen to a dollar. You would have to divide. This keyboard would be totally inadequate for a Japanese customer.

Q. You also have a decimal point that appears, do you not? A. Yes.

Q. That would be inappropriate for Japanese, from your previous testimony? A. Yes, the decimal would be between the third and fourth row. This is between the second and third.

Q. Now, let's assume what we want to do would be to lift off these keys that have German language on them and insert instead keys that would have English equivalents. Would that mean that would then make this **(Page 44)** a cash register which, in your opinion, could be marketed in the United States? A. No, because this would be built to meet the tax requirement for German, and these are primarily tax control keys in this area.

Q. All right.

If you just changed these keys, for example, from German to English, what would the printer do? A. It would still continue to print the German characters and indicate the German characters.

Q. All right.

Now, if I changed the printer wheel—is that what is involved here? A. Yes.

Q. And if I changed the indicator so that they also had English equivalents, would I have a machine which, in your opinion, could be used by a continental United States consumer? A. No.

Q. Why not, sir? A. Well, the keys are made to function, for instance, this key may be subtracting in this application and there may be no need for subtraction. This next key may be calculating a tax at seven percent or four percent or three percent, again, this would not be **(Page 45)** applicable, for instance, in Ohio for the Ohio tax law.

Q. At seven percent, it may become usable; but it is not usable today, I assume. A. Right.

Q. Now, with respect to this particular machine, are there any differences in the drawer, for example? A. Yes. There is a very definite difference here. As many of you in this room know, the mark is much wider than the dollar, so what has been necessary is that we have had to sacrifice space because of the extra width which is roughly about five-eighths of an inch wider than you would find in a domestic cash drawer.

Q. Now, would that—would currency variations mean that a cash register that was made for a consumer within the U.K. might differ in appearance from this cash register? A. Yes, in U.K., as the denominations go higher, the bill gets wider. You would have to have a staggered set of compartments to offset the value of the currency.

Q. In 1967 with respect to a machine of this kind which might have been manufactured for the U.K., would there have been other differences? A. Yes. In 1967, Great Britain was on Sterling which means that they had twelfths, rather than tenths, so you had an entirely different type of mechanism **(Page 46)** inside the machine than you would have in this one.

Q. Now, sir, have you studied the work order card and the production card with respect to this particular machine? A. I have not.

Q. You have not.

Can you tell by looking at this machine whether or not it is wired to perform any functions other than record sales data? A. Well, by looking at the machine on the back, I can see that it is wired for change computation.

Q. All right, sir.

Now, what kind of change computation? A. This would be wired for marks.

Q. That wiring—could that change computation be used with respect to pennies, nickels and dimes? A. Again, without looking at the schematic drawing, I can't answer the question. The chances are that it probably cannot, but I cannot be absolutely positive on that.

Q. All right.

Within your knowledge, and answer if you do not know that you do not know. Do you know that the wiring for a change mechanism for an international machine may not operate in the United States because of (Page 47) the differences in the coinage? A. I can tell you positively it wouldn't operate in the United States because there has to be a dispenser attached here and the dispenser is denominated for the coins of the country and the denomination of the coins in Germany are entirely different than the denomination of the coins we have in the United States. I unequivocally can say it will not operate in the United States.

Q. Is this machine able to determine now what change should be given to the customer? A. Yes.

Q. That is not a manual computation that is recorded? A. The distribution of the coins is completely controlled by the machine itself, and where you, for instance, have no equivalent of twenty-five-cent piece in Germany, there would be no way you could apply this.

Q. Is there some designation on this keyboard so the operator would, say, give me four of the big ones, whatever they are? A. No, it is automatic.

Q. All right. You may return to your seat, if you will. A. Thank you. (Page 48)

Q. Beside potential customers in Germany for this machine, where, if anywhere, is there a potential customer for a machine such as Exhibit 7? A. A German-

built machine would be very difficult to place anywhere else outside of Germany.

Q. To your knowledge, or to your belief, are there potential customers within continental United States? A. No, none to my knowledge.

Q. Could the machine be converted into a model which would have a domestic or continental United States market? A. It could, if you are willing to pay the cost.

Q. Could National Cash Register make such a conversion and sell the cash register at a price which would be competitive with a machine that was originally manufactured and produced for domestic consummation?

Mr. Statigos: Objection. There are all sorts of questions involved there, for none of which has a foundation been laid to show thatt his witness would have knowledge of that.

Examiner Hendershot: We will ask him.

He may answer if he knows.

The Witness: I can say that I do know, and that we have come prepared to prove to you what it would (Page 49) cost to change this particular machine to a United States constructed machine.

By Mr. Slagle:

Q. Now, my question, then, Mr. Gillen, is whether or not that conversion, once made, would produce a machine which would be competitive in price with a machine that was originally manufactured and produced for domestic consumption? A. No, it would not, and we have brought along the figures which will support this statement. To convert this machine to a United States keyboard would cost roughly sixteen percent of the total MLB.

Q. What does MLB mean? A. That is total cost of producing the machine which includes material, labor and burden.

Q. And now comparing that to the margin within which you normally operate, is that in excess of your margin? A. Well, our pre-tax profit is in the area of five percent, and so if you were to add sixteen percent to your cost, you would be totally out of business.

Q. All right.

Now, we have been using a Class 5 cash register, which is Exhibit 7 for identification.

Would your answers have been any different if **(Page 50)** we were using an accounting machine? A. No, the same basic principles apply.

Q. Would your answers have been any different if we had been using electronic data processing equipment? A. No.

Q. All right.

Now, I want to ask you a series of questions concerning the actual production of an item for sale to a foreign consumer. Let's again use the cash register.

What is the first assembly step with respect to a Class 5 cash register? A. The first thing that must be done is to arrange for the subassemblies of which this machine is made up to be produced.

One of the first subassemblies is the keyboard mechanism of the cash register.

Mr. Slagle: I ask this be marked as Exhibit No. 8 for identification.

Whereupon, Appellant's Exhibit No. 8 was marked for purposes of identification.

By Mr. Slagle:

Q. I hand you what has been marked as Appellant's Exhibit 8 for identification and ask you whether or not **(Page 51)** you can tell me what that is. A. Yes, it is one

of the control rows for a National Cash Register and it is of Spanish construction.

Q. How do you know it is of Spanish construction, sir? A. The language on it is Spanish.

Q. All right.

Assume that I wanted to convert this row of keys to Japanese, would I merely have to remove the keys that are now in place and substitute other keys which express the same matters in Japanese? A. This would be done, but it would have no value at all.

Q. Why not, sir? A. Well, these are the keys that control the function of the machine saying whether we are going to add, whether we are going to subtract, or whether we are going to multiply and it determines the function of the keys to the left of the machine.

Underneath this key bank there are eighteen strips of metal. These strips of metal have twelve positions on each one of these strips. Now, in order to determine the function of this machine and the inner relationship between each of these strips, we have these detents which automatically make the machine add, **(Page 52)** multiply, subtract, subtract from one total and add to another. This has been designed to function with the control rows at the left for a special individual transaction.

This construction is so complicated that if you change just one of these detents, then it affects the position on the other eighteen rows of control metal underneath here, or segments, and only a computer can determine the inner reaction of these individual detents when you change one single function.

Q. Now, how many detents have you testified there are with respect to this row of control keys? A. There are eighteen separate rows with twelve detents on each row,

and there are three rows of these in the cash register, so that gives you the possibility, numerically, of the various combinations or functions that you can make this machine do.

Q. You have indicated three rows of control keys. A. Yes.

Q. That are possible for a cash register? A. That is right.

Q. Is there an interrelationship between the various rows, once they are established? A. There is a direct relationship, and as I mentioned, just changing one of these detents sticking **(Page 53)** out here changes the function of every other segment in the machine.

Q. Now, we have previously had identified for us the factory work order card. Does that card identify for the factory personnel how the control keyboard and the detents and the metal strips are to be constructed? A. Well, this was actually done by a computer printout which printed the punch paper tape which, in turn, went to a machine that will automatically build these detents in accordance with the construction asked for here.

It also has determined before the punch paper tape was created that this combination of positions will actually, in fact, work on this machine.

Q. And do I understand your evidence to be that even the parts for this particular machine are not built in advance of the arrival of the equipment order? A. No. It is impossible. The equipment order determines the positions of the detents.

Q. Now, beside the rows of keys and the detents behind the keys, of what else, if anything, does a cash register consist? A. It consists of totals which can add, subtract, or cross add. By cross add, I mean go from one to the other, add in one, subtract another, and determine the **(Page 54)** net difference.

Q. Is a cash register essentially a manual or electrical machine? A. Primarily a manual machine with electric controls.

Q. I should have said manually controlled or electric controlled? A. Yes.

Q. You previously testified from the work order card that a model constructed for Japan required a current different than that which is used in the United States? A. Correct.

Q. With respect to Appellant's Exhibit 7 for identification, could we plug that into the current here in this hearing room and expect that that machine would operate? A. No, you could not.

Q. Why not, sir? A. This happens to be a fifty cycle motor in this machine.

Mr. Stratigos: Objection. Here again, he is asking the witness to testify about an electrical machine that will not operate on United States current and it is clear the witness is not an electrical engineer. **(Page 55)**

Examiner Hendershot: I don't believe he has to be an electrical engineer to answer that question. Again, he may answer if he knows.

The Witness: It is very simple. You have to have the ability to look at the plug here. Because of cooperation of international standards throughout the world, we make the sort of a plug for a fifty-cycle so that it will not fit into a sixty-cycle plug. Just try this, you will see that it doesn't work.

Mr. Slagle: All right, sir.

By Mr. Slagle:

Q. Now, does the internal electric wiring of a machine control in any way the various functions the machine is to perform? A. Yes, and I alluded to that when I referred to the wiring harness from the back of the machine.

Q. Would the wiring change depending on the function that was to be performed? A. Yes.

Q. Would the differences in the electric motors and currents which you have described with respect to the cash register be the same with respect to electronic data processing equipment? A. Yes.

Q. And accounting machines? **(Page 56)** A. Yes.

Q. Now, do your accounting machines also have control keys? A. Yes, they do.

Q. And do they also have the control metal bars that you have indicated which are present in Appellant's Exhibit 8 for identification? A. In an entirely different mechanical form, yes.

Q. And do they have the equivalent of detents? A. Yes, we call them stop positions.

Q. Now, with respect to EDP equipment, do they have things that are similar to control keys? A. Yes, except it is done entirely by electricity. It is done electronically.

Q. All right.

Beside the keys, printing wheels, indicators, wiring, and the motor, are there other differences between machines that are sold to foreign consumers and those sold to continental United States consumers? A. Well, now, we are talking about an application of equipment and the business application and the usage of machines in the United States, basically, is different from that in most countries of the world.

Q. Could you illustrate that, please? A. Yes. **(Page 57)**

In the United States, in the retailing field, the degree of merchandise control is different. The philosophy is different than we have in most countries throughout the world. It happens that the techniques here are perhaps ten years ahead of most countries in Europe at the moment, and we have what we call automatic reorder systems. We have economic order quantities and so forth

which are gotten as a by-product of recording a sale on a machine, and that information is used for a computer input on the more sophisticated models.

Q. During 1967, where was the international inventory actually warehoused? A. In Dayton, Ohio.

Q. Has the location of that warehouse changed since 1967? A. Yes, it has.

Q. Now, do you conduct periodic reviews of what international inventory consists of? A. On a monthly basis, yes.

Q. What is the purpose for those reviews? A. The purpose is to review the machines which are in the inventory to determine why they are there.

Usually the reasons for these: Many countries today will not allow a partial shipment. For example, on one of the exhibits here, we show that there are **(Page 58)** one hundred seventy machines. Some countries would not allow you to split that shipment into ten or twenty or thirty units.

Now, in a production cycle, the machines do not come out one hundred seventy at a time, but may come off two or three a day. You must consolidate those machines prior to shipment.

In other areas, particularly in the EDP area, where we may be manufacturing peripherals in several different spots and the main frame comes from a different location, we have to bring the entire EDP system together before it can be shipped and we have to consolidate.

The other reason that we have inventory is the fact that we have not been able to get an importation license, and this comes about in the following way:

For instance, Colombia is a good example. At the time an order is placed by the customer and our people have

gone to the government and asked: Will we be able to get an importation license?

They say: Yes.

Is foreign exchange available?

Yes, at that time it is.

But at the time of actual shipment, the foreign exchange situation might have deteriorated and the government refuses to issue an import license until their (Page 59) balance of payments problem is in better shape.

We have had cases in Colombia where it has taken up to two or three years after the equipment was actually built before we could actually ship it into the country and get the importation license.

This is not at all unusual. We had a case in the Philippines, now, which has had very severe inflation. They have had a devaluation of over sixty percent in the currency.

The currency is now floating. The actual importation licenses are only issued on the basis of availability of foreign currency so we build the equipment and then we have to wait until we get an importation license.

In other cases, a letter of credit may be held up and we again must hold this equipment until all of the original agreements made on this particular order are met.

Q. Are machines ever placed in the warehouse by the International Division awaiting a determination as to whether or not they will be offered on the domestic market? A. Never.

Q. Now, do you sell any machines to a foreign purchaser on consignment? (Page 60) A. Never.

Q. Have you had any machines sold to a foreign purchaser returned? A. No.

Q. Have you produced machines pursuant to an international order where, for some reason or other, the purchaser has defaulted? A. Yes.

Q. What have you done with those machines? A. This becomes a very severe problem to us. I can give you a current example.

We had a large order placed in the Belgian Congo—the Congo. It is now no longer the Belgian Congo. We do not have a subsidiary in the Congo. We operate through a general agent.

A general agent is a private businessman doing business in that country. There are certain countries in the world that will not allow an international company to operate in the retail—as they call it, retail sector, so in that case, we have to go to individual private businessmen. In this particular case in the Congo there was an order for a large number of accounting machines. They were built with the French language and basically French construction, and then the general agent was not able to get the financing to bring them **(Page 61)** into the country and there was no solution but to cancel the order.

Q. Now, the general agent that you refer to, is he an employee of NCR? A. No, he is a private individual businessman.

Q. All right.

Now, let me clear up a few matters. Are all of the inventory items, or were all of the inventory items in 1967 cash registers, accounting machines, and EDP equipment? A. Yes.

Q. And do you produce any machine for the International Division without an order for that machine? A. We do not.

Q. Does National Cash Register have competitors in the foreign market for cash registers, accounting machines, and EDP equipment? A. The business equipment industry is probably the most competitive industry in the entire world, and the answer to that is that in every major country where there are locally—there is locally

manufactured equipment which is available for domestic use and it is exported throughout the world, much of that equipment comes into the United States today.

Q. Now, are those competitors all continental **(Page 62)** United States manufacturers? A. No, actually only a small fraction of the total competitors are United States companies.

Q. Who are the major competitors with respect to cash registers, for example? A. Shenko from Japan, Anchor from Germany, Sweda from Switzerland, Hugen from Switzerland, Gross from the U.K. Those are just a small number of the total in this business.

Q. Are they also manufacturers of accounting machines and EDP equipment?

Mr. Stratigos: I object. I don't see the relevancy of this line of questioning.

Mr. Slagle: I think it is relevant, especially when we have a claim here that the State has laid a tax on export items, which items must compete in the foreign market with non-resident or non-United States manufacturers I believe I am entitled to establish that the base for that principle of law is a factual base in this case.

Examiner Hendershot: You may answer.

The Witness: Would you repeat the question?

By Mr. Slagle:

Q. Are they also producers of accounting machines and EDP equipment? A. I actually gave you companies whose primary **(Page 63)** business is cash registers. Some of these companies, Anchor, for example, in Germany, make a complete line of accounting machines. However, the number of people in the accounting machine business are even more numerous than those in the cash register. The EDP business is expanding in the same way.

As an example, in the accounting machine area, a company that you would never associate with that business

is Philips of the Netherlands. They have become very strong competitors in the accounting machine business and are moving into the United States in a very big way with business machines, also a name in Germany that you would not assume to be in the business machine business are now becoming major factors in the EDP business.

Semantoma Electric Company in Japan, which you certainly would not assume as being a part of the EDP industry, are major factors in manufacturing computers today.

Q. Did you have this kind of competition in 1967 and 1968? A. Yes.

Mr. Slagle: I have no further questions, sir.

Examiner Hendershot: Very well.

Do you have any cross examination? **(Page 64)**

Mr. Stratigos: Yes.

Cross Examination

By Mr. Stratigos:

Q. Mr. Gillen, I believe you testified you were the Vice President in charge of International Administration of National Cash Register. Is that correct, sir? A. Correct.

Q. And you were in that position during the year 1967? A. I was.

Q. Is that correct, sir? A. Yes.

Q. Can you tell me a bit about your educational background? A. Yes.

Q. Where you went to high school and college? A. I went to City College in Baltimore and the University of Maryland.

Q. What did you major in? A. Economics.

Q. You majored in economics? A. Yes.

Q. And that was when, sir? **(Page 65)** A. In 1936, 1937, 1938.

Q. And you are today physically located — your office is physically located in Dayton, Ohio? A. Yes.

Q. And you office is in the plant area, is that correct? A. Yes, reasonably correct. We are spread over a very, very large area in Dayton, but certainly our office is among some of the manufacturing buildings.

Q. Well, I see. Is it correct to say that your office is not physically located in a manufacturing building? A. All the buildings in Dayton complex are connected by a tunnel, so to that degree we are related to the manufacturing facility.

Q. But you are not actually in the manufacturing plant, is that correct, or one of them? A. Not at this time, but may I add one point?

Q. Okay. A. When I was President of the Canadian Plant, I was — I had the manufacturing plant under my control. I am reasonably —

Q. I am just concerned with where your office is located. Okay? A. All right. **(Page 66)**

Q. Now, sir, then, in the course of your present position, I assume you have had occasion to go to the manufacturing area? A. Yes.

Q. Where the machines are made? A. Yes.

Q. And discuss these machines with the various engineers, electricians, and so forth, is that correct, sir? A. I would not do that in the normal course of my work.

Q. But it has happened on occasion, is that correct? A. Yes, it has.

Q. And did the same thing occur while you were in charge of the Canadian Division? A. Yes.

Q. And then, sir, would it be correct to say that some portion of the knowledge that you have of these ma-

chines was derived from your conversations with other people? A. Yes, that is correct, as all knowledge is imparted.

Q. And then, sir, in part what you have related here today is what other people have told you, is that **(Page 67)** correct, sir? A. I am also relating what I know from my own experience in working with these products for the last thirty years.

Q. Now, sir, with regard to the corporate structure of The National Cash Register Company, and in particular with regard to facilities located in Dayton, I believe you stated that the international operations and the domestic operations were separate and distinct operations. Is that correct, sir? A. That is correct.

Q. Now, does the international operation take the form of a division of the corporation? A. It is the International Marketing Division.

Q. I see. Does the domestic division — A. Domestic Marketing Division.

Q. And are both units located at your Dayton facility, or is there some office of each division at your Dayton office? A. They are in widely separated areas.

Q. But they are both in Dayton? A. They are both in Dayton, yes, that is correct, because that is the world headquarters of The National Cash Register Company. **(Page 68)**

Q. Now, sir, I believe your testimony to this point has been to the effect that a cash register which was initially manufactured for foreign markets would have three significant differences from a machine for the American market.

One, the keys one the register.

Two the drawer.

Three, the motor.

Is that a correct statement, sir? A. No, it is not. The basic differences are the functioning inside the internal mechanism of the machine is entirely different. The keys on the external side are only symbolic of what takes place inside in the mechanism.

Q. All right, sir.

When you speak of the interior workings of the machine, then you are talking about something in addition to the mechanisms, I believe, on Exhibit 8?

Mr. Slagle: That is the correct exhibit number.

By Mr. Stratigos:

Q. Is that correct, sir? A. Yes.

Q. And it would be something different in addition to the drawer? **(Page 69)** A. Yes.

Q. And it would be in addition to the wiring connected to the motor, is that correct, too, sir? A. Yes.

Q. And now, sir, can you tell me, do you — with regard to your domestic market, do you normally provide some sort of service to these machines? A. Yes.

Q. Do you also service contracts for foreign machines? A. Yes.

Q. In other words, they would be serviced by your people, say, in Japan. Is that correct? A. Yes.

Q. And if a part of a machine that was sent to Japan went on the blink, would you be able to order a new part locally in Japan? A. If it was a United States built machine, the part would always come from the United States.

Q. I see.

With regard to a domestic machine, where would that part be obtained? A. From the United States.

Q. Would I be able to purchase that part, I not being NCR repairman? **(Page 70)** A. Yes.

Q. In other words, those parts are available to anyone, is that correct, sir? A. Yes, if you know what to order. I

would like to call your attention to the fact that in order to make that part, it doesn't exist. Only eighty percent of the parts in that machine are common. The other twenty parts are special parts.

Q. If I gave you a serial number? A. There are no serial numbers.

Q. Is the machine identified in any particular way? A. The machine is identified by serial number, but no serial numbers appear on the parts. You would have to designate the part and where it was going to be used. Then, we would go to the original computer tape and produce that part from that.

Q. In other words, if I gave you the serial number of that particular machine and told you my motor burned out, you could obtain for me a new motor? A. Yes, I could.

Q. And the same would be true with regard to the keys, is that correct? A. That is correct.

Q. And if a person is knowledgeable, with regard to the construction of a National Cash Register which **(Page 71)** had been prepared for foreign export, he could change those parts, is that correct, sir? A. He could.

And you say — you qualified your remark by the words "If he were competent." That would be — that is a very speculative situation.

Q. Yes, sir.

Now, you have testified with regard to what the competitive situation has been in the machine business. Is that correct, sir? A. Yes.

Q. Can you tell me, would an IBM man, by looking at a technical diagram, plan, or whatever you call it, of the National Cash Register be able to repair that machine? A. I would say absolutely not. This construction that we have is a very unique type of construction and this is one of the reasons why we are able to compete against equip-

ment all over the world. To my knowledge, this is the only mechanical device where the parts are completely made by a computer and designed.

Q. Are you telling me nobody but essentially a National Cash Register man could repair your machine? A. Or an NCR-trained man.

Q. All right. **(Page 72)**

Now, sir, you have also testified, I believe, that each machine is manufactured to specifications. Is that correct, sir? A. That is correct.

Q. And that the first step in that process is the putting together of the key mechanism, is that correct? A. That is normally the first function, yes, sir.

Q. All right.

Is there any part of the machine which can be put together prior to the receipt of an order? A. No.

Q. In other words, sir, you are telling me that on each order, you would go out and pick up whatever pieces of wire, whatever pieces of metal, whatever pieces of plastic, whatever else may be in the machine, pick each piece up separately, and at that point begin the construction of the machine? A. No, I didn't say that at all.

What I did say is that we have eighty percent of the parts are parts common. There are twenty percent of the parts — this is an estimate — that are specially built for the particular machine, so after we have manufactured the parts which are special construction, they are brought into the various assembly points and then they are merged with the parts common. **(Page 73)**

Q. All right, sir.

Now, with regard to the parts common, are they put into any type of — are they constructed or assembled in any way prior to report of an order? A. Absolutely.

Q. They are?

And are the separate component parts, the eighty percent that you mentioned, put into the form of a register? A. Oh, no. They are strictly component parts.

Q. And none of the components go together until you receive an order, is that correct? A. Absolutely correct. We do not build on speculation.

Q. Now, sir, you have also testified with regard to your monthly review of inventory, and therefore, I assume that you are familiar with your inventory. A. I am familiar, personally.

Q. Were you responsible for the filing of the return, the 1968 return? A. No, sir, I was not.

Q. Are you familiar with the inventory on Schedule 3 of that return, sir? A. I have never seen Schedule 3.

I might say that my responsibility is for the **(Page 74)** input that goes into the preparation of that form.

Q. In other words, you keep facts and statistics and so forth? A. Yes.

Q. Records — A. All records, unit and financial.

Q. Fine.

Then, can you tell me, sir, at what point do you place a finished machine into inventory? A. Yes. As soon as it is built.

Q. In other words, once all the component parts are put together, it enters your inventory? A. And packed, it has to pass final inspection. As soon as it is packed and ready for export shipment, it goes into our inventory. It is work in progress up to that time.

Q. So it is completely finished in the package and at that point it goes into merchandising inventory, is that correct? A. Into the International Division Marketing's inventory.

Q. All right, sir.

Now, once the machine has been placed in inventory, when do you remove it from inventory? At the time you send an invoice, the day the machine is **(Page 75)** marked with the name of the purchaser, the day the machines are shipped to the shipping area, or the day the machines are placed on board a commercial carrier? A. When the item has actually left the dock, the shipping dock, or the warehouse and a shipping document is received. That is the basis for relieving the physical inventory.

Q. And that is after the machine has been put on board a commercial carrier that the machine leaves your inventory? A. That is absolutely correct.

Q. Now, sir, in your direct testimony, you stated that there has been an occasion where you have received an order for machines and I think the reference was to the Congo? A. Yes.

Q. The machine was constructed and the order subsequently cancelled. Is that correct, sir? A. Yes.

Q. What became of the machines then, sir? A. As I mentioned to you, sir, the Congo was formerly a Belgian protectorate or confere, using the French language. Fortunately, there are several countries in the world that have a similar background. The Ivory Coast have the same one, culture is French, the **(Page 76)** language is French, and we were able to take these machines and apply them to a French area, at substantial cost to us, but we didn't have to change the language, the punctuation, and so forth.

Q. So it would be true to say you have received machines into your inventory which were received for international market? A. Yes, but I think I also said this is very rare occasion to have a cancellation. In other words, I had to search very hard to come up with this example where we had a cancellation.

Q. All right, sir.

Now, I believe you also testified — withdraw that.

Would this same situation, or might this same situation occurred during 1967, sir? A. Yes.

Q. In other words, during 1967, there may have been machines, or to your knowledge there may have been machines on the premises of NCR which were initially prepared for international market, but which NCR ended up keeping, is that correct, sir? A. Okay. I will agree with you if I can qualify what you have said.

No. 1, any machine that was built for the **(Page 77)** international always is shipped into international. To my knowledge, no piece of equipment ever built for the International Division has ever gone into any area other than the International Division.

Q. All right, sir.

With regard to the exhibits, can you tell me, sir, Exhibit No. 1, with the chart of business locations, can you tell me the date this chart was prepared? A. This is a fairly recent chart because we have just reorganized the Ivory Coast, and the Cameroons and Gabon. This has been revised within the last year.

Q. So this, in essence, isn't the same chart or same list of subsidiaries you had in 1967? A. No, our company is a dynamic company and changes are occurring constantly, but the changes are relatively minor.

Q. But it is not the same? A. No, sir, it is not.

Q. And with regard to Exhibit No. 2, sir, can you tell me the date that this item was prepared? A. Yes. August 28, 1970.

Q. And does that represent a machine that would have been sold during 1967? A. Yes.

It is a type of machine that would have been **(Page 78)** sold.

Q. But it does not represent a machine that was sold during 1967? A. No, this happens to be an order sold on August 28, 1970, but this model number would have been available.

Q. But this purchase order does not represent one of the pieces of equipment that would have been included in your merchandising inventory for the year 1967? A. No, this was simply used as an illustration.

Q. Okay. A. I think I did testify, though, that the forms were identical to the ones used in 1967.

Q. And can you tell me the date this Exhibit 3 was prepared, sir? A. No. Without going to the tracer number — I can take the tracer number and if the Examiner wishes, we can certainly give you that information, because everything reverts to a tracer number.

Q. But you cannot tell me when that sheet was prepared from the exhibit itself, can you, sir? A. No, I can't.

Q. So you would not know whether that was used during 1967 or not, whether those specifications were used. Is that correct? **(Page 79)** A. Yes.

You see, as I mentioned to you, this stock number is an international stock number and, again, this would probably have been available in 1967. It is an international number available for the International Division.

Q. Probably, but not sure, is that right? A. I would say it is a reasonable certainty.

Q. All right.

How about No. 4? Can you tell me when this was prepared? A. Let me see it.

Q. All right. A. Yes. I can tell you when actual production started. This, again, was analyzed on September 11, 1970, and production started shortly after that.

Q. Therefore, that represents a machine which was not constructed or assembled by NCR during 1967, is

that correct? A. That is correct. Again, this was simply drawn as an illustration of our procedure that is used in the International Division.

I think it might be helpful to the court to know why we have to do this. After three years, our hard records are reduced to microfilm. What we would **(Page 80)** have had to do was bring microfilm into court if they were necessary. We have them if they are necessary, but they are available, but they are not available in the hard copy form.

Q. Could you tell me as regards Exhibit No. 5 when that was prepared? A. Yes. This was prepared in 1968.

Q. And can you tell me, sir, whether that particular piece of equipment which is shown there would have been included in the merchandise and inventory on Schedule 3 of your 1968 return? A. No, that would be pure speculation. It would have been because of the date.

Q. But you don't know? A. No.

Q. Okay. A. But, again, it is typical, or illustrating export packing. That was the purpose of that exhibit.

Q. Exhibit No. 6. Can you tell me when this was prepared, sir? A. May I have the original?

Q. Yes. A. No, I cannot.

Q. So you don't know whether that was in existence in 1967 or not? **(Page 81)** A. No, but, again, because it has the international designation, we would assume that it was available at that time.

Q. But the exhibit itself does not show at any place the date of publication? A. No. Again, this is simply to illustrate how our machines are promoted in the language of the country.

Q. So you wouldn't know if that was used in 1967, would you? Yes or no. A. I would not know.

Q. Thank you, sir.

Now, with regard to Exhibit No. 7, the cash register, can you tell me when that particular cash register was constructed, sir? A. Yes. It came right off the line.

Q. It is a new one? A. Yes.

Q. Constructed in 1971? A. That is correct, sir.

Q. So it would not have been a part of the assessment in 1967, is that correct? A. That is correct. It is simply an example of a foreign built machine.

Q. All right, sir.

Can you tell me with regard to Exhibit No. 8 **(Page 82)** when that particular item was built, sir? A. No. There is no way that I could tell because this simply happens to be a component.

Q. And you don't even know if that was part of the assessment, is that correct? A. No, I would have no way of knowing. This is, again, an example of how our machines are built.

Q. Now, sir, you also testified to a large extent with regard to current in foreign countries. Can you tell me, sir, do any countries, foreign countries, to your knowledge, operate on the same current that the United States operates on? A. No, sir, most of the countries today are on a decimal system, but the coins are entirely different.

Q. Excuse me, I was speaking of electric current. A. Oh, electric current.

Q. Yes. A. Yes, other countries have sixty cycle, 110-120, but they are very rare, some have it.

Q. I see.

And, sir, since you have also testified to certain electrical things, can you tell me whether it would be possible to plug that particular machine into a converter of tips and then plug it into the register to have it operate? **(Page 83)** A. We could put a converting plug in here so it would go in, but you would still burn the motor out.

Q. In other words, there is — withdraw that. Mr. Stratigos: I have no further questions. Examiner Hendershot: I have no questions. Is there any redirect?

Mr. Slagle: Sir, I have been told Mr. Stratigos would like to take a recess at 11:30. If I could reserve my response to that question until after lunch, I would appreciate it very much.

Examiner Hendershot: Satisfactory with you?

Mr. Stratigos: Yes.

Examiner Hendershot: Very well, come back at 1:00 o'clock.

Mr. Slagle: Thank you.

(Noon recess.)

AFTERNOON SESSION

Examiner Hendershot: Do you have a witness?

Mr. Slagle: We have no further questions of Mr. Gillen.

Examiner Hendershot: Very well.

Do you have anything further of him, Mr. Stratigos?

Mr. Stratigos: No.

Mr. Slagle: At this point, I would like to move into evidence Appellant's Exhibits 1 through 8, except that I would like the Court's permission to withdraw Exhibit No. 4 and substitute a photographic copy therefor; to withdraw Exhibit No. 8 and have photogrpahic copies thereof, and Exhibit No. 7, and have photographic copies thereof.

Examiner Hendershot: Is there any objection to the withdrawal and substitution of photographs?

Mr. Stratigos: No.

Examiner Hendershot: Are there any objections to the exhibits?

Mr. Stratigos: Yes. I would like to object to all of them because none of them were part of the assessment, none of them were in existence in 1967, nor do they represent any of the materials subject to **(Page 85)** assessment. Consequently, I would object on the ground that they are irrelevant.

Examiner Hendershot: The objection will be overruled and they will be admitted as being representative of the items involved in the matters to be considered.

Mr. Slagle: Thank you, sir.

Whereupon, Appellant's Exhibits Nos. 1 through 8, inclusive, were received in evidence.

Examiner Hendershot: Do you have the photographs at the present time, or when are you going to do that?

Mr. Slagle: I have the photographs for No. 4, but not for No. 7 and No. 8. We have a photographer on the way over here. While Mr. Stratigos is here, we can perhaps agree as to what pictures should be used.

I would like to call as our next witness Mr. Charles Harman. **(Page 86)**

Charles R. Harman,

being first duly sworn as prescribed by law, was examined and testified as follows:

Direct Examination

By Mr. Slagle:

Q. Please state your name and address. A. Charles R. Harman, Main and K Streets, Dayton, Ohio, 45409.

Q. I take it that is your business address, Mr Harman? A. Yes.

Q. Is your residence also in Dayton? A. It is in Kettering, Ohio.

Q. By whom are you employed, Mr. Harman? A. By the International Division of The National Cash Register Company at Dayton, Ohio.

Q. Where are you employed? A. In —

Q. I am sorry, you said Dayton, Ohio. A. Yes, world headquarters.

Q. How long have you been employed by NCR? A. It will be sixteen years on October 22.

Q. What is your title or position with NCR? A. I am Manager of the International Accounting **(Page 87)** Department.

Q. And how long have you had that title or position? A. Since November 18, 1968.

Q. Before you were made Manager of the International Accounting, what was your title or position? A. I was Section Head of the International Accounting Section.

Q. How long did you have that position? A. I assumed that position on May 1, 1967.

Q. What is the distinction, now, between Section Head and Manager of International Accounting? A. Prior to November of 1968, the international accounting was handled by a section within another department and in November, 1968, they changed it and made it a separate department, rather than a section within a department.

Q. Please describe for the Board what your duties are as Manager of International Accounting? A. My duties are to supervise the preparation and maintenance of the accounting records for world headquarters office, reporting to the corporate headquarters on all of our international operations overseas.

Q. Are the records with respect to the international inventory maintained under your direction and **(Page 88)** supervision? A. Yes, they are.

Q. Is the international inventory assigned a separate account number? A. Yes, it is.

Q. What is that account number? A. 22841.

Q. Are the records with respect to the international inventory of dates preceding your appointment as Manager of the international accounting preserved under your direction, supervision, and control? A. Yes.

Q. During 1967, were you familiar with the manner in which the international inventory accounting records were maintained? A. Yes.

Q. Please describe for the Board what comprises the international inventory accounts. A. The international inventory account is composed of the cost of units built in the United States for export to our subsidiaries overseas.

Q. Now, are you familiar with what kind of machines comprise the international inventory account? A. Yes. This account is composed of cash registers, accounting machines, and EDP peripheral products. **(Page 89)**

Q. All right.

Have you caused to be made a schedule which shows the month end balance of the international inventory account for each month of calendar year 1967? A. Yes.

Q. Have you also caused those month end balances to be totalled and divided by twelve? A. Yes.

Q. Is National Cash Register on a fiscal or a calendar year? A. They are on a calendar year.

Q. Are the records used for compiling the month end balances currently available in this hearing room? A. Yes.

Q. Are those voluminous records? A. Yes.

Q. Were those records used for other corporate purposes, other than preparing the month end balances? A. Yes. These records become a part of the total corporate inventory, and they are included in reporting to top management, the Board of Directors, the stockhold-

ers, as well as the United States Securities and Exchange Commission.

Mr. Slagle: I will ask this be marked as Appellant's Exhibit No. 9 for identification. **(Page 90)**

Whereupon, Appellant's Exhibit No. 9 was marked for purposes of identification.

By Mr. Slagle:

Q. I hand you, Mr. Harman, what has been marked for identification as Exhibit No. 9 and ask you whether or not you can identify that. A. Yes.

Q. What is that, please? A. This is a typed copy of the ledger balances on Account No. 122841, representing international machines for the month endings during 1967.

Q. What does your schedule show to have been the total value of those machines warehoused in Ohio? A. The total of the month end balances is $22,892,450.

Q. Did you divide that figure by twelve? A. Yes.

Q. What was the result of that mathematical operation? A. That division gives you an average monthly balance of $1,907,705.

Q. Once again, what does that represent, please? A. This represents a cost of the products in our international inventory at the end of each month during **(Page 91)** the calendar year 1967.

Q. And is that international inventory warehoused only in Ohio? A. Yes, this is warehoused only in Ohio.

Mr. Slagle: I have no further questions.

Examiner Hendershot: Do you have any cross examination?

Mr. Stratigos: Yes.

Cross Examination

By Mr. Stratigos:

Q. With regard to Exhibit No. 9, can you tell me what the caption "Non-Ohio locations" means? A. Yes. These are units built and located in other states than Ohio. For example, our adding machines are built in Ithaca, New York.

Q. All right, then, those are transported to Ohio? A. No, these were shipped from the plant at Ithaca, New York. They would go to the port of embarkation in New York City from Ithaca, New York.

Q. And the caption "ledger balance," can you describe what that means, sir? A. Yes. This is a balance carried on the ledger of our company with this account number at the top, **(Page 92)** 122841.

Q. In other words, is this the beginning? This would be the ending inventory for each month. Is that correct, sir? A. Yes.

Q. This is a ledger balance on the dates as shown, for example, January 31, 1967, $2,220,094. Is that the ledger balance? A. Yes.

Q. How do you arrive at that figure? In other words, do you start with a beginning inventory of some type or what? A. Yes, start with a beginning balance. Units are added during the month that are completed, and units that are shipped are deleted from this balance.

Q. And since you have your records here, sir, could you perhaps show me the spot in your records where I could see the ending balance for August 31, 1967? A. Yes.

Q. Would you show it to me, then? A. Yes.

Q. Would you describe what you are showing? A. This is a copy made of the general ledger trial balance of inventories for the National Cash Register Company and

the description is "International **(Page 93)** finished machine inventory, warehouse, Account No. 22841," and the balance is $2,254,111.

Q. And what you have been reading from, sir, is the original document, or original record which recorded this figure? A. I am not sure I understand your question.

Q. In other words, sir, the material that you have just read to me from, is that the first time that it was recorded in any of the records of National Cash Register? A. Yes. This is the official journal ledger trial balance, and this is the first time this amount was included or reported. The date is stamped at the top indicating when that was reported.

Q. And, sir, this sum you gave me of $2,254,111, would that be derived from the preceding month's balance? Is that correct, sir? A. It would be a result of taking the previous month's balance and adding units that are completed and then deleting units that have been shipped.

Q. And can you show me in your records, sir, where we could correlate that to the prior months or follow through on that computation that you just mentioned? A. I believe I could, yes. **(Page 94)**

Q. Would you please do so? A. Yes, let me ask this. I can show you the trial balance for the previous month, but I did not bring here a copy of the actual ledger showing the balance — showing the entries.

Q. I would like to see the computation in your records that would take you from 7-31-67, ledger balance in the amount of $1,960,363 to the ledger balance at 8-31-67 showing the amount of $2,254,111. A. These are photocopies showing the individual units that made up the inventory at the end of July, and then the units that made up the inventory at the end of August, so

there has been — there are additional records on file at our corporate headquarters that would show detail. These are all on microfilm.

Q. In other words, you cannot take me — show me the accounting steps involved and the recording of the accounting steps involved from what you have with you today to take us from 7-31-67 and the 1,960,363 and the $2,220,094? A. I can describe these steps and I can show the units that make up the balances at the end of the accounting period.

Q. But you cannot show me your computations, is that correct, sir? **(Page 95)** A. What do you mean by computations?

Q. If I understood your prior testimony to be correct, sir, the way you came up with an end of the month balance would be to take the beginning balance. A. Okay. In other words, the unit added and the unit deleted.

Q. That is correct, sir. A. No. I do not have all those records. They are very voluminous, and we deal with approximately two to three thousand units going in and out during a month.

Q. Okay, sir.

Can you also show me in your records where the amount of $97,559 for the date of August 31, 1967, was derived? A. That amount is going to be composed of individual sheets in here that are added together.

Q. Did you run a tab of the individual sheets, sir? A. A tab was run by people who work under my supervision. I don't have that tab with me.

Q. And can you tell me, then, sir, from the records that you have with you here today in the condition they are in, you cannot verify from your records the

fact that $97,000 plus was the normal high volume for the month of August, 1967. Is that correct, sir? A. If I were to take these reports and pick out **(Page 96)** the individual ones that compose the $97,000, I should be able to add these and come up with that figure.

Q. Okay, sir.

Can you show me the slips that would go to comprise the sum of $97,559? A. Yes, I can show those to you. Those should be the sheets.

Q. Will you describe what you have just handed me, sir? A. These sheets that I handed you are showing adding machines that were built and were in the warehouse in Ithaca, New York, at the end of the accounting period that we are talking about here.

One machine is located in New York City, but these indicate the class and the model number as well as the serial number and the NCR reference number that has been assigned when this unit was built to fill an international order.

Q. All right, sir.

Now, from those sheets, can you show me or indicate the figures which would compose, when added together, the sum of $97,559? A. That should be the inventory value figures.

Q. May I see it? A. Yes. **(Page 97)**

Q. And which of the many figures on the page in that column would represent — which would go in to making up this? A. These amounts here, like the $652.

Q. All right. What else, sir? A. This $652 here, the $375, the $375, the $295, and that would appear on each sheet, $1,861, and those amounts.

Q. Is there a compilation of these numbers anywhere in your records, sir?

Mr. Slagle: Do you understand the concept "compilation"?

The Witness: I believe he means to indicate the total.

Mr. Stratigos: Yes.

Mr. Slagle: That is the exhibit.

Mr. Stratigos: I am asking about the one figure.

The Witness: That would not appear as an individual amount. In other words, it would be a total made of these individual amounts.

By Mr. Stratigos:

Q. For one particular amount, sir? Right? A. Yes.

Q. Would one month's figures be available on one (Page 98) sheet of paper or several sheets of paper? A. Several sheets of paper.

Q. Can you find the several, or do you have them all now? A. I believe these are the ones here.

Q. And these are copies — what physical shape — what is the physical object which the copies represent? Is it a sheet of paper, a ledger sheet of some sort? A. This is a sheet that was kept and microfilms. In other words, these copies were produced from microfilm records.

Q. And the copies, the items that were microfilmed were the corporate records of the company and they were the first time in the corporate records where these figures are recorded? A. Yes.

Q. In other words, you do them on IBM or NCR printouts? A. Yes, NCR printouts.

Q. All right, sir.

Now, you also testified that parts manufactured in Ithaca, New York, are shipped from Ithaca, New York. Is that right? A. That is my understanding.

Q. And you don't know this of your personal (Page 99) knowledge? A. In other words, they are built in Ithaca, New York, and the factory reports to me that they have

completed a unit for an international order number, and that that unit is located in Ithaca, New York.

Q. All right, sir.

Are you familiar with the method of transporting machines from the Dayton location? The commercial carrier used? A. No, I am not extremely familiar. I imagine they are — because of the closeness of the plant, they are probably handled by truck, and NCR owns trucks, and I imagine NCR trucks are used to move the equipment.

Q. In other words, the NCR puts the goods on their own trucks and transports them out of the state. Is that right sir? A. No. I thought the question was how they are moved from the plant to the warehouse.

Q. I see.

In other words, once the machines are completed and packaged, they are moved from the manufacturing area to the warehouse? A. That is my understanding, yes.

Q. And from there, they are taken and put on a carrier? **(Page 100)** A. Yes, commercial carrier.

Q. In other words, a truck, some trucking company takes them? A. Yes, it could be a truck or a train.

Q. And do you know where the items go once they have been moved by truck or train from the warehouse area? A. They would go to a port of embarkation to be loaded on a ship, if they are going by ocean freight.

Q. One other question. The warehouse and the manufacturing area are both in Dayton. Is that correct, sir? A. No.

Q. They are not? The warehouse is where, sir? A. It is located near Middletown, Ohio.

Q. Is Middletown in Montgomery County, do you know? A. I don't know.

Mr. Stratigos: I have no further questions.

Examiner Hendershot: I have no questions.

Is there any redirect?

Mr. Slagle: Yes.

Redirect Examination

By Mr. Slagle:

Q. In 1967, was the warehouse located in **(Page 101)** Montgomery County? A. Yes.

Mr. Slagle: No further questions.

Examiner Hendershot: You may be excused.

Mr. Slagle: I move admission into evidence of Appellant's Exhibit 9 for identification.

Examiner Hendershot: Is there any objection?

Mr. Stratigos: On the basis of the best evidence rule, I object. These are copies. The witness has not been able to tell me how he went from one balance to another balance which is a normal accounting procedure, and on that basis, I don't think I can accept this as the best evidence.

Examiner Hendershot: The objection will be overruled and it will be admitted.

The two folders which he had in his possession, he said, if you totaled the figure in a particular column, it would give you the $97,559, and if you deducted that from the other, you would get the figure in the last column.

These are here and he testified they were made as a printout from the microfilm of the original records which had been the original records the first time they appeared. They are admitted.

Mr. Slagle: Thank you, sir. **(Page 102)**

Whereupon, Appellant's Exhibit No. 9 was received in evidence.

Mr. Slagle: The Appellant rests.

Examiner Hendershot: The Appellant having rested, is there any testimony or evidence to be presented by the Appellee?

Mr. Stratigos: No, sir.

Examiner Hendershot: Very well, do you desire to file a brief?

Mr. Slagle: Yes, sir.

Examiner Hendershot: You may have —

Mr. Slagle: We would like to request thirty days from the time of receipt of the transcript, sir.

Examiner Hendershot: All right.

Well, we will make the Appellant's brief due on September 23 which should give you that period of time, I am sure.

Mr. Slagle: Thank you, sir.

Examiner Hendershot: The answer brief on October 7, and a reply brief, if any, by October 14.

Mr. Slagle: Thank you.

Mr. Stratigos: Thank you.

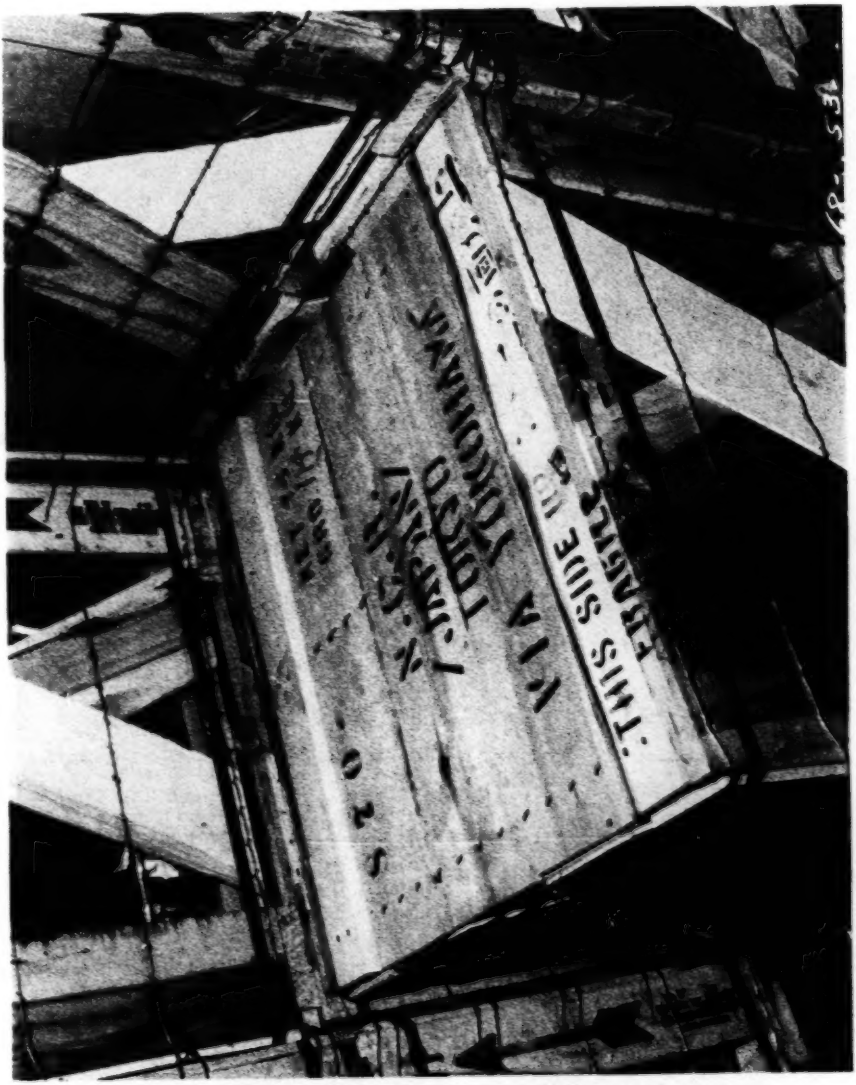
Examiner Hendershot: Thank you, gentlemen.

(The hearing adjourned at 1:35 p.m.) **(Page 103)**

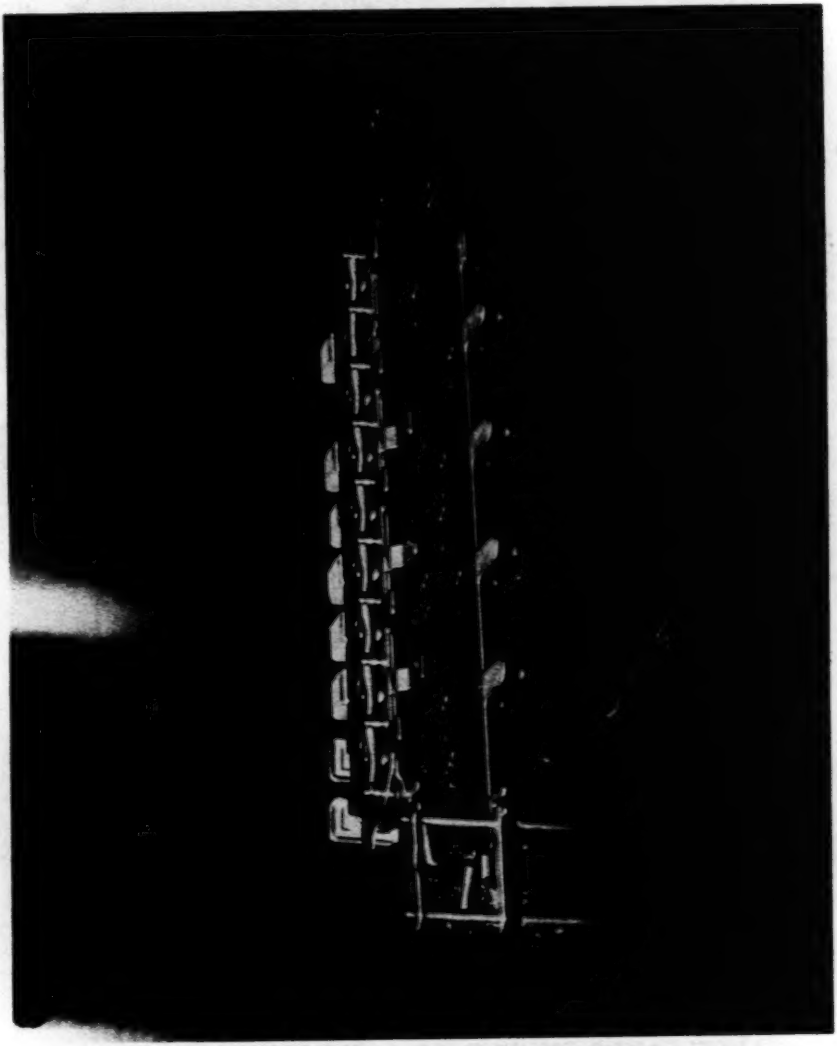
CERTIFICATE

I, Edwin H. Hammock, the undersigned, hereby certifies that the foregoing is a true and correct transcription of the proceedings before the Board of Tax Appeals, on the date indicated, as reported by me in shorthand and transcribed by me or under my supervision.

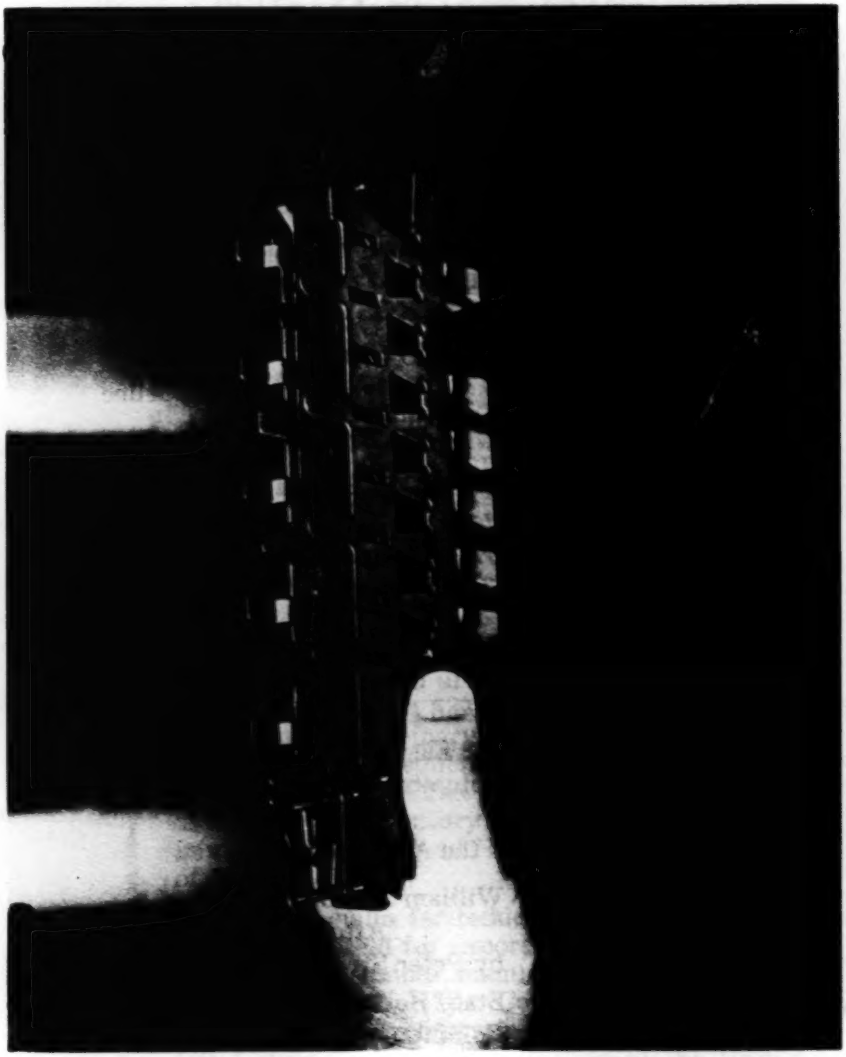
Edwin H. Hammock.



APPELLANT'S EXHIBIT NO. 5 (EXPORT PACKAGING)



PHOTOGRAPH OF APPELLANT'S EXHIBIT NO. 8



PHOTOGRAPH OF APPELLANT'S EXHIBIT NO. 8

BEFORE THE BOARD OF TAX APPEALS
DEPARTMENT OF TAXATION
STATE OF OHIO

THE NATIONAL CASH REGISTER COMPANY
Main and K Streets
Dayton, Ohio 45409

Appellant

vs.

ROBERT J. KOSYDAR
Tax Commissioner of Ohio

Appellee

No. 71-02-0330

PERSONAL PROPERTY TAX

(Tangible)

APPEARANCES: For the Appellant:

Dargusch and Day
by L. Orin Slagle, Jr.
and Roger Day
218 East State Street
Columbus, Ohio 43215

For the Appellee:

William J. Brown,
Attorney General
by Peter Stratigos, Assistant
State House Annex
Columbus, Ohio 43215

This cause and matter came on to be considered by the Board of Tax Appeals upon a notice of appeal filed herein by the above named appellant under date of February 23, 1971, from a final assessment certificate of valuation on Inter County Corporation Tangible Personal Property dated January 29, 1971, for the tax return year 1968, in which a deficiency of $1,477,700 is shown for Dayton Taxing District, Montgomery County, Ohio.

Appellant filed its notice of appeal from said assessment and in pertinent part said notice reads as follows:

> "Pursuant to Section 5715.02, of the Revised Code of Ohio, The National Cash Register Company, hereinafter "NCR", gives notice of its appeal to the Board of Tax Appeals, from a Final Assessment Certificate of Valuation for Montgomery County, issued with respect to Ohio Personal Property tax return year 1968, and bearing the date of January 29, 1971. A true and correct copy of the Certificate is attached hereto, made a part hereof, and incorporated by specific reference. Such Certificate is erroneous, in that it:

(1) Disallows a claim for reduction from Schedule 3, of idle, obsolete and unsaleable inventory (identified as Account No. 322530). Such inventory consists of used machinery, originally manufactured by NCR, and subsequently returned to it for various reasons. The Tax Commissioner erred by assessing such inventory in excess of its true value in money. See Section 5711.18 of the Revised Code of Ohio.

(2) Disallows a claim for reduction from Schedule 3, of inventory held for export. Such inventory consists of new machines, manufactured by NCR solely for export. The Tax Commissioner erred by assessing such inventory in violation of Article I, §10, Clause 2, of the Constitution of the United States.

> Because of the errors stated above, NCR requests that the Commissioner's determinations be reversed as unreasonable and unlawful, and that final judgment be entered in its favor."

At the hearing before the Board of Tax Appeals, appellant abandoned its claim under item (1) of its notice of appeal leaving only the item (2) in contention. Both items 1 and 2 began as claims for deduction from book value in which the claim for deduction for export inventory which was added back by the agent for the Tax Commissioner amounted to $2,159,035 at 50% listed value for $1,079,520.

The matter was submitted to the Board of Tax Appeals upon the notice of appeal, the statutory transcript furnished by the Tax Commissioner, the testimony and evidence presented to the Board of Tax Appeals at a hearing in Columbus, Ohio, on August 5, 1971, and the briefs supplied by counsel.

For many years, the appellant has engaged in the manufacture of cash registers, accounting machines and electronic data processing systems, which it markets throughout the United States and in 120 countries abroad. Its home offices, main producing facility and warehouse are located in Dayton, Ohio. In marketing its products, NCR has two Main divisions. One is known as domestic marketing and the other is known as international marketing. Although the two divisions are not separately incorporated, there is total separation of the international operation of NCR from its domestic operations. Each division is headed up by a group Vice President, who reports directly to the President of the company. Each is housed in a separate facility and has its own accounting staff and sales force. With respect to inventory, each division has its own record control system and products that

are packaged for export from the plant or warehouse have identifiable packaging from products packaged for domestic delivery.

The only inventories of items destined for exportation, which NCR maintained in Ohio in 1967 were located in Dayton, Ohio. These inventories consisted of cash registers, accounting machines and electronic data processing equipment, all of which had been contracted for purchase by foreign buyers prior to manufacture.

Each machine is custom built to accommodate commercial peculiarities of the particular country to which it is to be shipped and of the individual consumer.

The ultimate objective of an NCR salesman when calling on a foreign customer is to determine from a detailed survey of the customer's business if there is any need for an NCR product. Once a need has been established, the salesman decides how best to build an NCR product to meet the customer's individual requirements in that foreign country.

If an order is placed, it is sent to the factory at Dayton, Ohio, where the product is custom-built for the foreign buyer. NCR has no inventory of products already constructed to meet an order when it arrives at Dayton.

Each order is accompanied by a building instruction sheet when it arrives at Dayton on which is a model number followed by a series of numbers. The model number indicates the country to which the product is to be shipped and the following series of numbers describes in code the individual functions the machine is to perform. The building instructions sheet is prepared by the individual salesman in the foreign country with the assistance of technical people in that country. No order can be accepted by NCR without this sheet.

When a foreign order along with the necessary accom-

panying documents is received by NCR, a factory work order card is prepared. This card contains the necessary production language to enable the factory to build the machine to the exact specifications of the customer.

After a machine has been produced pursuant to the customer's specifications, it goes to final inspection for determination that it, in fact, has been built as specified on the factory work order card. The machine is then packed for export shipment.

Machines packed for export shipment are readily distinguished from those packed for domestic shipment. Most of the equipment sold in the United States is packaged in cardboard boxes; however, export equipment is sealed in very heavy plastic moistureproof covers and packed in wood crates, which are reinforced by wire bands and steel straps. In addition, the machine's foreign destination is stenciled on the side of the crate.

The crated machines are then taken to an NCR warehouse to await shipment. In 1967, the international inventory was housed in Dayton, Ohio. There are several reasons why NCR maintains an international inventory. Many countries will not allow a partial shipment or, often a country has a balance-of-payments problem and will not issue an import license until a later date. In other cases, a letter of credit may be held up or necessary transportation may not be available.

It was the opinion of appellant's witness that due to their unique construction and special adaptation for foreign use, these machines are not salesable domestically, that an item destined for an export customer and exported by NCR never finds its way back into the United States. NCR has had no machine sold to a foreign purchaser which has been returned.

The testimony was that a cash register destined to be exported to Japan, for example, would not be saleable in the United States. The keyboard is used to record yen, rather than dollars. The decimal point is after the third column, rather than the second. Because there are 350 yen to a dollar, the machine is capable to recording a transaction of 99,999,999 and that a machine with such a high capacity has no application in this country. Furthermore, the keys, printing mechanism, and indicators appearing in the window are in Chinese characters. The motor and electrical system is designed specifically for Japan. Japan uses 100 volt current, whereas 110-120 is standard in the United States. If a machine designed for Japan were plugged into U. S. current, the motor would ultimately burn out. Many machines exported to Japan are designed to run on 50 rather than the 60 cycle current employed in the United States. If a machine designed to run on 50 cycle current were plugged into a current with 60 cycles, you would get a slow operation, which would make the machine add wrong because of the change in cycling time. The same is true of all NCR export products including accounting machines and electronic data processing systems.

Many machines are equipped for special functions such as automatic change making. Such a mechanism will not operate in the United States because the attached dispenser is denominated for foreign coins, which are entirely different from the denomination of coins in this country.

The testimony was that more than the mere mechanics makes an export machine unsaleable in the United States. In the United States and in the retailing field, the marketing philosophy is different from that in most countries throughout the world. The techniques here are perhaps

ten years ahead of most countries in Europe at the moment. For example, many domestic consumers demand automatic reorder systems, which feed data from the cash register into a computer network. These systems would be unavailable on export models.

The testimony further was that an NCR export product could not *economically* be converted by NCR for sale domestically. Such conversion would require the machine to be sold at a price which could not be competitive with a machine that was originally manufactured and produced for domestic consumption.

The United States Constitution, Article I, Section 10, Clause 2 provides that:

> "No State shall without the consent of Congress, lay any Imports or duties on Imports or Exports, except what may be absolutely necessary for executing its inspection laws ***"

The tax herein involved is an ad valorem tax levied upon all personal property located and used in business in this state.

The very able briefs filed by counsel discuss at length the elements necessary for personal property to acquire the status of an export. Many cases are cited and considered but all are other than Ohio cases. Most are Federal cases and through all of these cases run two judicially articulated criteria which must exist concurrently for personal property to be exempt from state taxation as an export:

(1) the property must have started on its journey to a foreign destination

(2) the property must be irrevocably committed to export.

It is appellant's contention that actually only the second is necessary but that if the first is required then its movement to its warehouse is sufficient.

With this the Board of Tax Appeals does not agree. From a careful study of the cases cited it is clear that there are many variables considered by the Courts as to when the movement begins but nowhere is it said that the second test alone is sufficient.

Giving consideration to the facts, the case law, the constitutions, statutes and the very able briefs and arguments of counsel, it is the decision of the Board of Tax Appeals that the final assessment certificate of valuation herein must be, and hereby is, affirmed.

I hereby certify the foregoing to be a true and correct copy of the action of the Board of Tax Appeals of the Department of Taxation, this day taken, with respect to the above matter.

ARTHUR W. MOORE, Secretary

THE NATIONAL CASH REGISTER CO., APPELLANT, *v.* KOSYDAR, TAX COMMR., APPELLEE.

[Cite as National Cash Register Co. v. Kosydar (1973), 35 Ohio St. 2d 166.]

Taxation — Tangible personal property — Exemption — Section 10, Article I, Constitution—Prohibition against state tax on exports—Test—Machines designed and built exclusively for foreign consumers—Exempt as "exports."

(No. 72-479—Decided July 11, 1973.)

APPEAL FROM THE BOARD OF TAX APPEALS

This is an appeal by The National Cash Register Company from a decision of the Board of Tax Appeals, the effect of which was the upholding of a tax assessment made by the Tax Commissioner with respect to the company's 1968 inter-county corporation return of taxable property.

In that return, and before the Board of Tax Appeals, National Cash Register (NCR) contended that certain of its machines had, at the time they were included in the company's taxable inventory and their value assessed for tax purposes by the Tax Commissioner, become irrevocably committed to exportation and had commenced the journey which would lead necessarily and undeniably to their exportation from the United States. Therefore, NCR contended, the inclusion of the machines in the taxable inventory pursuant to Ohio personal property law was a violation of Section 10, Clause 2 of Article I of the United States Constitution, the Import-Export Clause.

NCR, a Maryland corporation, has its world headquarters, main production facility and warehouse in Dayton, Ohio. For many years it has engaged in the manufacture of cash registers, accounting machines and electronic data processing systems, which it markets throughout the United States and in 120 foreign countries. For marketing purposes, the company is organized into two major divisions, domestic and international, each totally separated from the other. The international marketing division has its own chief executive, a "group vice-president" responsible only to the president of NCR, and its own accounting staff, sales force, product line, and physical facility. With respect to inventory, the division maintains its own record control system and packaging processes for its products.

At the hearing before the Board of Tax Appeals, the international division's vice-president described the general marketing process, as follows:

"* * * The first thing that the salesman would have to do, of course, is to get the customer's interest and secure the permission of the customer to discuss his business with him, with the ultimate objective of being able to make a detailed survey of the customer's business to find out if there was a need for our product.

"Once that need had been established, the salesman would decide how best to take an NCR product * * * and build that product to meet the customer's individual requirements * * * "

He testified further that if an order is placed it is sent to the factory in Dayton, where the product is then manufactured. NCR maintains no inventory of machines which are available to meet incoming orders from foreign customers. An order form from a foreign customer will indicate the class of machine and the individual model to be

purchased, the basic construction of the individual machines, the number of machines ordered, their destination, and the terms of the sale. Each order is accompanied by a building instruction sheet, prepared by the individual salesman in the foreign country with the assistance of technical people in that country, which specifies, primarily, the indivdual functions the machines are to peform according to the peculiar commercial and individual requirements of the customer. No order is accepted in Dayton without a building instruction sheet attached to it.

When the order and the building instruction sheet are received by NCR, a factory work order is prepared. The work order contains the necessary production language to enable the factory to build the machine to the exact specifications of the customer. A work order covers every machine manufactured. After a machine has been produced it goes to final inspection for determination that it has been built to specification, and finally is packed and crated to withstand the unusual rigors of export shipment.

The crated machines are then taken to an NCR warehouse in Dayton to await shipment. It was the Tax Commissioner's assessment of the items in that international inventory as of December 31, 1967, tax lien date, which gave rise to this action.

The record reveals that NCR maintains an international inventory for several reasons. Many countries will not allow a partial shipment, so when a large order has been placed and the production cycle is only two or three machines a day, the machines must be consolidated and stored prior to shipment. In the electronic data processing area, the component parts of a system may be produced at several different locations, which also necessitates a con-

solidation prior to shipment. In many instances, NCR is unable to obtain an importation license from the country to which the machines are to be shipped at the time the shipment is ready, even though the country of destination may have agreed to supply one at the time the order was placed. Importation licenses are usually tied to the foreign exchange situation in the particular country, which is often impossible to predict. In one instance, a license was delayed for three years due to a balance-of-payments problem. Related difficulties involve local fluctuations in currency value, availability of foreign currency and unforeseen delays in obtaining letters of credit. The pitfalls in the operation of the international division are numerous, complicated and completely beyond the ability of NCR to predict with any degree of consistency.

The uncontroverted record establishes that no piece of equipment built for the international division has ever gone into any area other than the international division; that there is no recorded instance where a machine sold to a foreign purchaser was returned; and that no exported item has ever found its way back into the United States market. Likewise, it was uncontroverted that due to unique construction and special adaptation for foreign use, machines marketed by the international division were not merely noncompetitive in the United States market, but were not saleable there. The reasons for this include complex technical variations in keyboards, wiring, detents and motors; and, specifically as to cash registers, variations in dispensers, the amount of characters on the keys and in the windows and in the decimal point placement. There was evidence that electrical current varied from country to country, even in parts of the same country, in terms of standard voltage and cycles and, in some instances, as between AC and DC current. There

was also testimony that the degree of merchandising control in the retailing field in the United States was technically superior to that of other countries by ten years, making machines produced for foreign customers obsolete in the domestic market.

Further, an NCR export product could not economically be converted for domestic sale. Against the company's profit margin of approximately five percent per unit, the changeover cost would be approximately 16 percent per unit, rendering the possibility of a changeover totally unfeasible.

Upon the basis of all those factors, NCR urged that the machinery in the international inventory enjoyed an export status and should not be taxed. However, based mainly upon federal cases, the Board of Tax Appeals in its decision said:

"* * * two judicially articulated criteria * * * must exist concurrently for personal property to be exempt from state taxation as an export:

"(1) the property must have started on its journey to a foreign destination

"(2) the property must be irrevocably committed to export."

Unable to find any evidence that NCR had met the first test, or that compliance with the second test alone was enough, the board affirmed the assessment order with respect to the international inventory.

The cause is now before this court pursuant to an appeal as a matter of right by NCR.

Messrs. Dargusch & Day and Mr. Roger F. Day, for appellant.

Mr. William J. Brown, attorney general, *Mrs. Maryann B. Gall* and *Mr. Peter Stratigos,* for appellee.

PER CURIAM

Section 10, Clause 2 of Article I of the United States Constitution provides: "No state shall, without the consent of the Congress lay any imposts or duties on imports or exports * * *." This case requires us to determine whether the machines in NCR's international inventory, which were assessed by the Tax Commissioner, were "exports" within the meaning of that clause.

In answering that question, the Board of Tax Appeals applied a mechanistic, two-fold formula which it culled from phrases found in the leading "export" cases. *Coe* v. *Errol* (1886), 116 U. S. 517; *A. G. Spalding & Bros.* v. *Edwards* (1923), 262 U. S. 66; *Richfield Oil Corp.* v. *State Board of Equalization* (1946), 329 U. S. 69; *Joy Oil Co.* v. *State Tax Commission* (1949), 337 U. S. 286; *Empresa Siderurgica* v. *County of Merced* (1949), 337 U. S. 154; *Hugo Neu Corp.* v. *County of Los Angeles* (1970), 7 Cal. App. 3d 21, 86 Cal. Rptr. 332; *Rice Growers' Assn. of California* v. *County of Yolo* (1971), 17 Cal. App. 3d 227, 94 Cal. Rptr. 847; *Cargill of California* v. *County of Yolo* (1972), 26 Cal. App. 3d 704, 103 Cal. Rptr. 257. A majority of this court, however, is of the opinion that the instant case is particularly ill-fitted for a mechanical disposition.

The cases from which the two criteria for immunity from taxation were extrapolated by the board embraced products which were completely fungible or were viewed as such. In that situation, we can agree that nothing less than delivery to a carrier, marking the commencement of movement in the export stream, will suffice to guarantee that the process of exportation has been irreversibly initiated. This case, on the other hand, involves cash registers, accounting machines, and electronic data processing systems which have been ordered, designed and built exclusively to serve the peculiar needs of specific

foreign consumers. It is uncontradicted on the record that, in every material respect, the machines involved herein are useless in the domestic market and never find their way there. Of all the cases examined, we were unable to find any situation where the "certainty of export" has been more clearly demonstrated than in this case*; the degree of certainty here exemplified is fully equivalent to that which attends the delivery of fungible goods to a carrier for the start of a journey to a foreign destination.

The decision of the Board of Tax Appeals is reversed, except as to that portion of the assessment which relates to items destined for sale in the possessions or territories of the United States. As to such latter assessment, the decision of the board is affirmed.

DECISION REVERSED IN PART AND AFFIRMED IN PART

HERBERT, CORRIGAN, STERN, CELEBREZZE and W. BROWN, JJ., concur.

O'NEILL, C. J., and P. BROWN, J., dissent.

O'NEILL, C. J., dissenting. I dissent on authority of R. C. 5709.01 and the cases decided by the United States Supreme Court involving Section 10, Clause 2 of Article I of the United States Constitution. See *Coe* v. *Errol* (1886), 116 U. S. 517; *A. G. Spalding & Bros.* v. *Edwards* (1923), 262 U. S. 66; *Richfield Oil Corp.* v. *State Board of*

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*Of perhaps equal certainty was the DDT in *Montrose Chemical Corp.* v. *County of Los Angeles* (1966), 243 Cal. App. 2d 300, 52 Cal. Rptr. 209 (cert. den. 386 U.S. 1004). But, see, *Rice Grower's Assn. of California* v. *County of Yolo* (1971), 17 Cal. App. 3d 227, 94 Cal. Rptr. 847.

Equalization (1946), 329 U. S. 69; *Joy Oil Co.* v. *State Tax Commission* (1949), 337 U. S. 286; *Empresa Siderurgica* v. *County of Merced* (1949), 337 U. S. 154.

R. C. 5709.01 provides, in pertinent part:

"* * * *All personal property located* and used in business *in this state* * * * [is] *subject to taxation* * * *." (Emphasis added.)

This tax applies to all property manufactured to order and "then taken to * * * [a] warehouse * * * to await shipment," whether that shipment is to be made to Columbus, Buffalo, San Francisco, or a foreign country.

The revenue raised by the tax imposed upon this property is used in accordance with law to pay for the local services of government by counties, municipalties, townships and health districts and for the operation of schools provided for the benefit of all private and corporate businesses and the citizens of the local communities in which those businesses are located.

The appellant in this case understandably would like to be relieved of its share of the taxes for the support of schools and local government upon its inventory awaiting shipment. Appellant contends that it is in a different position from all other manufacturers of products for both domestic and foreign shipment.

The only basis on which the appellant can claim immunity from this tax on its personal property inventory "stored prior to shipment" or "taken to an NCR warehouse in Dayton to await shipment" is that the tax imposed by the General Assembly of Ohio upon all personal property is unconstitutional under the provisions of Section 10, Clause 2 of Article I of the United States Constitution as to appellant's property, even though it is valid as to all other manufacturers' property awaiting shipment in warehouses.

No case decided by the United States Supreme Court supports appellant's position. In my opinion, it is easy to determine why this is true.

The sole issue in this case is: When does the exemption from taxation provided in the export-import clause of the United States Constitution attach to the goods?

The controlling rule of law in this regard is succinctly stated by Mr. Justice Frankfurter in *Joy Oil Co.* v. *State Tax Comm.* (1949), 337 U. S. 286, at page 288, as follows:

"The Export-Import Clause was meant to confer immunity from local taxation upon property being exported, not to relieve property eventually to be exported from its share of the cost of local services. See *Coe* v. *Errol*, 116 U. S. 517, 527-28."

As Justice Frankfurter said in *Joy Oil Co., supra*:

"The circumstances which tended, at the time when the tax was assessed, to establish petitioner's intent to export the gasoline and the fact that the gasoline was eventually exported are not enough, by themselves, to confer immunity from local taxation. See, *e. g.*, *Cornell* v. *Coyne*, 192 U. S. 418; *Empresa Siderurgica* v. *County of Merced*, 337 U. S. 154."

So in the instant case, the circumstances which tended, at the time the tax was assessed, to establish (1) petitioner's intent to export, (2) the certainty of export if a profit was to be made from the manufacture of the property, and (3) the fact that all similar property manufactured by the company in the past had been exported eventually are not enough, by themselves, to confer immunity from local taxation.

The appellant places emphasis upon the argument that many of the United States Supreme Court cases holding goods not immune from local taxes have so held because

of possible diversion of the goods to the domestic market. It is asserted that those cases involved fungible goods, while the machines in the instant case, because of their character, were not saleable in the domestic market, were not fungible, and were not divertible, and, therefore, should be exempt from local taxation. Such a fungible-goods argument may have some validity once the process of exportation has started and the exemption has attached to the goods. Then and only then, under the cases, does the question arise as to the certainty of the goods completing the process and reaching the foreign destination as against the possibility of being diverted to the domestic market. See, *e. g., Joy Oil Co., supra; Empresa Siderurgica, supra.* However, the fungible-goods argument is not relevant to the question presented in the instant case.

The factual question of fungible or nonfungible goods plays no part in a determination of when the process of exportation begins, *i. e.*, when the exemption initially attaches. See *A. G. Spalding & Bros. v. Edwards* (1923), 262 U. S. 66.

The intent to export clearly is not sufficient to commence that process and change a machine stored awaiting shipment into an export. *E. g., Joy Oil Co., supra.* The certainty of export is not sufficient to convert property in a warehouse awaiting shipment to an export. *Empresa Siderurgica, supra* (cement plant parts crated awaiting shipment overseas held not exports and not immune from local taxes). The fact that the machines were made to order for a foreign market or that such machines have always been shipped overseas eventually does not make a product stored in a warehouse awaiting shipment an export exempt from taxation. *Cf. Coe* v. *Errol, supra; Hugo Neu Corp.* v. *County of Los Angeles* (1970), 7 Cal. App. 3d 21, 86 Cal. Reptr. 332.

If the above were true, the argument could be made with equal logic and force that all property stored in the factory awaiting manufacture of a machine, or certainly all property in process of manufacture into a machine, is exempt. No doubt the General Assembly could exempt such property from local taxes for local services, but it has not done so.

Argument is advanced by the appellant, in brief, that a change in the law extending the exemption from taxes would serve a useful purpose with regard to national monetary or trade policy. For this court to ground its decision upon such unexpressed reasons is contrary to the settled law that acts of the General Assembly are presumed to be constitutional unless clearly in violation of constitutional provisions. R. C. 1.47(A); *State, ex rel. Dickman,* v. *Defenbacher* (1955), 164 Ohio St. 142, 128 N. E. 2d 59.

The machines in this case meet the requirement of goods destined for foreign commerce. They were ordered by a foreign customer. Once the process of exportation is commenced, a persuasive argument could be made that they are certain to be exported and, therefore, exempt.

However, at the time the tax was assessed the exemption had not attached to the articles as required by law because they were simply stored awaiting shipment—title and possession was in the appellant, payment had not been made, no export license issued, no letter of credit authorized, and the machines were in complete control of appellant; but, most important, there was no movement of goods, no shipment, no process of exportation. There is no certainty of export. The record establishes that some machines have remained stored in the warehouse awaiting shipment for three years. The orders could be cancelled, the export license might never issue,

the financing may fail to materialize, the machines could be destroyed, dismantled or sold for scrap. These machines were no different from any other mass of goods in a warehouse awaiting shipment. They were not an export exempt from local taxes until they moved—in plain language, until they were shipped or at least moved to or into a means of transportation. *Empresa Siderurgica* v. *County of Merced, supra; Joy Oil Co., supra.*

The objection is made that this is a "mechanistic" concept. (See dissenting opinion in *Empresa Siderurgica, supra.*) I can not agree. The court has held that the exemption attaches to the articles or the goods. The time at which it attaches must be established. *A G. Spalding & Bros.* v. *Edwards, supra.* The rule expressed by the majority fails to deal with this fundamental question. It leaves vague and unanswered the real question in the case which is: At what point did the machines become "exports" exempt under the Export-Import Clause?

P. BROWN, J., concurs in the foregoing dissenting opinion.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1978

No. 78-629

THE NATIONAL CASH REGISTER CO.,
Appellee,

vs.

ROBERT J. KOSYDAR,
TAX COMMISSIONER OF OHIO,
Appellant.

ON APPEAL FROM THE SUPREME COURT OF OHIO

JURISDICTIONAL STATEMENT

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INDEX

	Page
Opinions Below	2
Jurisdiction	2
Question Presented	4
Statement of the Case	4
The Federal Question Presented is Substantial	6
Certificate of Service	40

Appendix:

(A)	Opinion of the Supreme Court of Ohio	14
(B)	Order of the Supreme Court of Ohio Denying Rehearing	26
(C)	Decision of the Ohio Board of Tax Appeals	27
(D)	Certificate of Valuation/Final Order of the Tax Commissioner of Ohio	35
(E)	Notice of Appeal to the Supreme Court of the United States	36
(F)	§5709.01 and §5711.13 of the Revised Code of Ohio	38

CITATIONS

Cases:

Cargill of California v. *County of Yolo*, 26 Cal. App. 3d 704, 103 Cal. Rptr. 257 (1972) ---------- 7

Coe v. *Errol*, 116 U.S. 517 (1886) ----------3, 6, 7, 11

Empresa Siderurgica v. *County of Merced*, 337 U.S. 154 (1949) ----------3, 6, 10, 11

Joy Oil Co. v. *State Tax Commission*, 337 U.S. 286 (1949) ----------3, 6, 10, 11

National Cash Register Co. v. *Kosydar*, 35 Ohio St. 2d 166, 298 NE 2d 559 (1973) ----------4, 12, 14

Hugo Neu Corp. v. *County of Los Angeles*, 7 Cal. App. 3d 21, 86 Cal. Rptr. 332 (1970) --------- 6

Rice Growers' Assn. of California v. *County of Yolo*, 17 Cal. App. 3d 227, 94 Cal. Rptr. 847 (1971) -- 6

Richfield Oil Corp. v. *State Board of Equalization*, 329 U.S. 69 (1946) ----------3, 6, 8, 11

A. G. Spalding & Bros. v. *Edwards*, 262 U.S. 66 (1923) ----------3, 6, 8, 9, 11

Constitution:

Constitution of the United States, Article I, Section 10, Clause 2 ----------2, 3, 5

Statutes:

28 U.S.C.A. §1257 (2) ---------- 3

§5709.01, Revised Code of Ohio ----------2, 3, 11, 38

§5711.13, Revised Code of Ohio ----------2, 3, 38

§5717.02, Revised Code of Ohio ---------- 2

§5717.04, Revised Code of Ohio ---------- 2

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1973

No. _____

THE NATIONAL CASH REGISTER CO.,

Appellee,

vs.

ROBERT J. KOSYDAR,
TAX COMMISSIONER OF OHIO,

Appellant.

ON APPEAL FROM THE SUPREME COURT OF OHIO

JURISDICTIONAL STATEMENT

Appellant, Robert J. Kosydar, Tax Commissioner of Ohio, appeals from the judgment of the Supreme Court of Ohio entered on July 11, 1973, rehearing denied September 6, 1973. The 5-2 decision of the Ohio Supreme Court prohibits the Tax Commissioner of Ohio from imposing a personal property tax assessment against certain property of the National Cash Register Company in Ohio, as the Commissioner is directed to do under the existing tax statutes of Ohio and as he is permitted to do under the decisions of the United States Supreme Court dating back to 1886. The Tax Commissioner of Ohio

submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial federal question is presented.

OPINIONS BELOW

The opinion of the Supreme Court of Ohio is reported in 35 Ohio St. 2d 166, 298 N.E. 2d 559 (1973), and is attached as Appendix A. The order of the Court denying the Tax Commissioner's Motion for Rehearing is unreported and a copy is attached as Appendix B. The intermediate decision of the Ohio Board of Tax Appeals is unreported and a copy of that decision is attached as Appendix C. The primary certificate of assessment of the Tax Commissioner of Ohio is unreported and a copy is attached as Appendix D.

JURISDICTION

(i) In its 1968 Ohio personal property tax return and in all subsequent proceedings, the National Cash Register Company (NCR) contended that the inclusion of certain machines in its manufactured inventory, otherwise subject to Ohio personal property taxation, were immune from taxation as exports under Article I, Section 10, Clause 2 of the United States Constitution — the Import-Export Clause. The Tax Commissioner of Ohio disagreed with this contention and levied personal property taxes upon the machines under the authority given to him by §5709.01 and §5711.13 of the Revised Code of Ohio. Pursuant to §5717.02 of the Revised Code of Ohio, NCR then appealed the assessment to the Ohio Board of Tax Appeals, which affirmed the assessment on May 25, 1972.

(ii) Under the provisions of §5717.04 of the Revised Code of Ohio, appeal from the decision of the Board of Tax Appeals was next taken to the Supreme Court of

Ohio by NCR. The Court rendered its decision on July 11, 1973, reversing the decision of the Board of Tax Appeals. The final judgment of the Supreme Court of Ohio denying the Tax Commissioner's Motion for Rehearing was entered on September 6, 1973. Notice of appeal to the Supreme Court of United States was filed both in the Supreme Court of Ohio and the Ohio Board of Tax Appeals on September 12, 1973, and a copy is attached as Appendix E.

(iii) The statutory provision which confers jurisdiction of the appeal upon this Court is 28 U.S.C.A. §1257(2).

(iv) The following cases sustain the jurisdiction of the Supreme Court to review the judgment of the Supreme Court of Ohio on direct appeal on this case:

Coe v. *Errol*, 116 U.S. 517 (1886); *A. G. Spalding & Bros.* v. *Edwards*, 262 U.S. 66 (1923); *Richfield Oil Corp.* v. *State Board of Equalization*, 329 U.S. 69 (1946); *Joy Oil Co.* v. *State Tax Commission*, 337 U.S. 286 (1949); *Empresa Siderurgica* v. *County of Merced*, 337 U.S. 154 (1949).

(v) The sections of the Revised Code of Ohio which direct the Tax Commissioner to assess personal property for taxation are §5709.01 and §5711.13, attached as Appendix F. The portion of the United States Constitution by which NCR denies their applicability is contained in Article I, Section 10, Clause 2:

> "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports except what may be absolutely necessary for executing its inspection Laws; and the net Produce of all Duties and Imposts, laid by any State on Imports and Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress."

QUESTION PRESENTED

When does the exemption from taxation provided in the Import-Export Clause of the United State Constitution attach to property otherwise taxable under the laws of the State of Ohio?

STATEMENT OF THE CASE

The National Cash Register Company has its world headquarters, main production facility, and warehouse in Dayton, Ohio. For many years it has engaged in the manufacture of cash registers, accounting machines, and electronic data processing systems which it markets throughout the United States and in many foreign countries.

The items involved in this case were of such kind, finished, crated, and in storage awaiting foreign shipment in the Dayton warehouse on December 31, 1967, when personal property tax was assessed against them. As of that date

> ". . . they were simply stored awaiting shipment—title and possession was in [NCR], payment had not been made, no export license issued, no letter of credit authorized, and the machines were in complete control of [NCR]; but, most important, there was no movement of goods, no shipment, no process of exportation. There is no certainty of export. The record establishes that some machines have remained stored in the warehouse awaiting shipment for three years. The orders could be cancelled, the export license might never issue, the financing may fail to materialize, the machines could be destroyed, dismantled or sold for scrap. These machines were no different from any other mass of goods in a warehouse awaiting shipment. . . ."
>
> *National Cash Register Co.* v. *Kosydar*, 35 Ohio St. 2d 166, 175; 298 N.E. 2d 564, 565 (1973) (O'Neill, C. J. dissenting). Appendix A, at 24, 25.

Nevertheless, and essentially on the grounds that the machines produced for export were built only to order and to foreign specifications, NCR appealed the Tax Commissioner's assessment to the Ohio Board of Tax Appeals. NCR's notice of appeal stated that since the machines were manufactured solely for export, the assessment was ". . . in violation of Article I, §10, Clause 2, of the Constitution of the United States."

The Ohio Board of Tax Appeals, with little comment, affirmed the assessment of tax. It based its decision on all of the federal and most of the state decisions bearing upon the Import-Export Clause—nearly one hundred years of precedent including at least five decisions of the Supreme Court of the United States (*supra*, at 3)—prescribing two criteria which must exist concurrently for personal property to be exempt from state taxation as an export:

> "(1) the property must have started on its journey to a foreign destination
>
> "(2) the property must be irrevocably committed to export". (Appendix C, at 33)

Further, the Ohio Board of Tax Appeals found that while there appeared to be many variables pertaining to *when* the movement contemplated in number (1) above begins, nowhere was it said that the second test alone, as advocated by NCR, was sufficient.

NCR appealed that decision to the Supreme Court of Ohio. Again, but more specifically, the same issue was raised, "[are] goods, certain to be exported, whether or not their transportation has been commenced, . . . immune from state taxation by reason of Article I, Section 10, Clause 2 of the Constitution of the United States of America." (*Brief for Appellant* before the Supreme Court of Ohio, at i; Notice of Appeal of Appellant).

The Tax Commsisioner again argued the position which was presented to and adopted by the Ohio Board of Tax Appeals — certainty export alone is not sufficient to grant immunity from state taxation. Actual movement of property into the stream of export must have commenced.

The Supreme Court of Ohio, however, reversed the decision of the Ohio Board, permitting the "certainty of export" test alone to prevail in Ohio. The Supreme Court relegated the necessity that the journey to a foreign destination be commenced only to situations involving fungible goods.

The Tax Commissioner's Motion for Rehearing before the Supreme Court of Ohio was denied on September 6, 1973. Notice of Appeal to the Supreme Court of the United States was filed both in the Supreme Court of Ohio and the Ohio Board of Tax Appeals on September 12, 1973.

THE FEDERAL QUESTION PRESENTED IS SUBSTANTIAL

By its decision, the Supreme Court of Ohio has left the major pillar of the Ohio Tax Commissioner's position uncontroverted either by case law or logic. As found in the leading "export" cases, it is simply that personal property is not immune from state taxation unless it has started on its journey to a foreign destination. *Coe* v. *Errol*, 116 U.S. 517 (1886); *A. G. Spalding & Bros.* v. *Edwards*, 262 U.S. 66 (1923); *Richfield Oil Corp.* v. *State Board of Equalization*, 329 U.S. 69 (1946); *Joy Oil Co.* v. *State Tax Commission*, 337 U.S. 286 (1949); *Empresa Siderurgica* v. *County of Merced*, 337 U.S. 154 (1949); *Hugo Neu Corp.* v. *County of Los Angeles*, 7 Cal. App. 3d 21, 86 Cal Rptr. 332 (1970); *Rice Growers' Assn. of Cali-*

fornia v. *County of Yolo*, 17 Cal. App. 3d 227, 94 Cal. Rptr. 847 (1971); *Cargill of California* v. *County of Yolo*, 26 Cal. App. 3d 704, 103 Cal. Rptr. 257 (1972).

The case law established by the United States Supreme Court shows the historical development of the test of "what is an export." The first case is *Coe* v. *Errol*, 116 U.S. 517 (1886). There, spruce logs were cut in New Hampshire and placed in a stream to be floated down the Androscoggin River to the State of Maine to be manufactured and sold. The logs were detained in the town of Errol, New Hampshire, by low water and were taxed by the selectmen of Errol in the year 1881. Mr. Justice Bradley said that the "precise question for solution" was:

> "Do the owner's state of mind in relation to the goods, that is, his intent to export them, and his partial preparation to do so, exempt them from taxation?" (116 U.S. at 525.)

The answer was no, because the spruce logs had not entered the stream of export. The Court stated:

> ". . . nor is exportation begun until they are committed to the common carrier for transportation out of the State to the State of their destination, or have started on their ultimate passage to that State. Until then it is reasonable to regard them as not only within the State of their origin, but as a part of the general mass of property of that State, subject to its jurisdiction, and liable to taxation there, if not taxed by reason of their being intended for exportation, but taxed without any discrimination, in the usual way and manner in which such property is taxed in the State." (116 U.S. at 525.)

In a rhetorical question, the Court asked ". . . until actually put in motion, for some place out of the State, or committed to the custody of a carrier for transportation to such place, why may they not be regarded as still

remaining a part of the general mass of property in the State?" (116 U.S. at 526.) There was no answer, for the Court decided that the logs were precisely the kind of property subject to state taxation.

The next case, *A. G. Spalding & Bros.* v. *Edwards*, 262 U.S. 66 (1923), involved a federal tax on baseballs and bats sold by the manufacturer. A Venezuelan firm ordered a New York commission house to buy a quantity of bats and balls for their account. The New York commission house placed the order with Spalding and instructed it to deliver the goods to an exporting carrier in New York for shipment to Venezuela. The goods were delivered to the carrier and an export bill of lading was issued.

Mr. Justice Holmes stated the issue: "[w]hether the sale was a step in exportation . . ." (262 U.S. at 68.) He concluded that exportation had begun:

> "The very act that passed the title and that would have incurred the tax had the transaction been domestic, committed the goods to the carrier that was to take them across the sea, for the purpose of export and with the direction to the foreign port upon the goods. The expected and accomplished effect of the act was to start them for that port.
> ". . . . . ."
> (262 U.S. at 68.)

The requirement that goods must begin their journey before they are exports was reiterated in *Richfield Oil Corp.* v. *State Board of Equalization*, 329 U.S. 69 (1946). The taxpayer there was a California refiner and seller of oil, that entered into a contract with the government of New Zealand to deliver oil "f.o.b." Los Angeles. The oil was transported from taxpayer's refinery to the harbor where it was placed in the taxpayer's storage tanks. When a New Zealand ship arrived, the taxpayer pumped the oil from its storage tanks into the hold of the ship. At the same time, the taxpayer received a bill of lading indicating it was the shipper. The tax authorities levied

a tax upon the gross receipts paid to the taxpayer. The Supreme Court of California held that since delivery of the oil marked passage of title, which was the time the tax attached, the transaction was not exempt since export had not begun. The California Supreme Court suggested that if the oil had been placed upon a common carrier rather than on the purchaser's ship, a different result might have occurred (329 U.S. at 74).

On appeal to the United States Supreme Court, California relied upon *A. G. Spalding Co., supra,* as supporting its proposition that delivery to a common carrier marked the start of the export process. In rejecting this contention, the Supreme Court of the United States commented:

> "The certainty that the goods are headed to sea and that the process of exportation has started . . . may normally be best evidenced by the fact that they have been delivered to a common carrier for that purpose. But the same degree of certainty may exist though no common carrier is involved. The present case is an excellent illustration. The foreign purchaser furnished the ship to carry the oil abroad. Delivery was made into the hold of the vessel from the vendor's tanks located at the dock. *That delivery marked the commencement of the movement of the oil abroad.* It is true, as the Supreme Court of California observed, that at the time of the delivery the vessel was in California waters and was not bound for its destination until it started to move from the port. But when the oil was pumped into the hold of the vessel, it passed into the control of a foreign purchaser and there was nothing equivocal in the transaction which created even a probability that the oil would be diverted to domestic use. *It would not be clearer that the oil had started upon its export journey had it been delivered to a common carrier at an inland point.* The means of shipment are unimportant so long as the certainty of the foreign destination is plain."
>
> (329 U.S. at 82-83; emphasis added.)

In 1949, the Supreme Court decided two export cases. In *Joy Oil Co.* v. *State Tax Commission*, 337 U.S. 286 (1949), a Canadian corporation bought gasoline in the United States for export to Canada. The gasoline was shipped by rail to Detroit and was stored in tanks for fifteen months before it was shipped to Canada. A municipal ad valorem tax was assessed on the gasoline.

The Supreme Court found the gasoline not immune from taxation. Mr. Justice Frankfurter explained:

> "The circumstances which tended, at the time when the tax was assessed, to establish petitioner's intent to export the gasoline and the fact that the gasoline was eventually exported are not enough, by themselves, to confer immunity from local taxation. . . .
> ". . . . . .
>
> "The Export-Import Clause was meant to confer immunity from local taxation upon property being exported, not to relieve property eventually to be exported from its share of the cost of local services. . . ." (337 U.S. at 288, 289.)

Finally, *Empresa Siderurgica* v. *County of Merced*, 337 U.S. 154 (1949), restated the necessity that the journey of exportation must have begun. A cement plant in Merced County, California, was sold to a South American corporation for export. An export license was issued, title passed, and a common carrier was hired to dismantle and package the plant for shipment. The County of Merced levied a personal property tax on the parts of the plant that had not been shipped out of the country.

The Supreme Court upheld the tax levy, stating:

> ". . . it is not enough that there is an intent to export, or a plan which contemplates exportation, or an integrated series of events which will end with it. . . . *It is the entrance of the articles into the export stream that marks the start of the process of exporta-*

> *tion. Then there is centainty that the goods are headed for their foreign destination and will not be diverted to domestic use. Nothing less will suffice."*
> (337 U.S. at 156-157; emphasis added.)

Thus, the United States Supreme Court has extended the protection of the Import-Export Clause *only* to those goods which have been irrevocably committed to the export stream. In *Coe* v. *Errol*, the spruce logs had not started upon their ultimate passage to another state. In *A. G. Spalding*, delivery of packages to an exporting carrier for shipment granted immunity from state taxation. In *Richfield Oil Corp.*, the state retail sales tax was void because the oil had been delivered into the hold of the vessel which took it to New Zealand. In *Joy Oil*, the fact that the gasoline was eventually to be exported did not render it immune when it was stored for fifteen months. And in *Empresa Siderurgica*, the parts of the cement plant not committed to movement out of the country on tax lien date were not exports.

In NCR's case, its goods were warehoused in Dayton, Ohio. They had not begun their journey. They were not delivered to a carrier when Ohio personal property tax was assessed by the Tax Commissioner. The goods were not in the export stream and were properly subject to Ohio taxation. This was the decision of the Ohio Board of Tax Appeals, which rested solely on its interpretation of the Import-Export Clause, but which was reversed by the Supreme Court of Ohio.

The General Assembly of Ohio, a coequal partner in the government of the state, enacted §5709.01 of the Revised Code of Ohio, which provides that ". . . All personal property located and used in business in this state . . . [is] subject to taxation . . . ." As noted in the dissenting opinion of O'Neill, C. J., below (Appendix A; 35 Ohio

St. 2d 166, 172), the revenue raised by the tax imposed is used in accordance with Ohio law to pay for the local services of government by counties, municipalities, townships, and health districts, including the operation of schools, providing benefit for all the citizens of Ohio, both private and corporate, in the respective local communities.

While NCR would understandably like to be relieved of its share of these state taxes, the only basis upon which is can claim such relief is by a new interpretation of the Import-Export Clause of the United States Constitution. As heretofore noted, that clause has been construed by the United States Supreme Court to grant immunity from state taxation *only* in those cases where the journey to exportation had begun. Unless that interpretation is modified by the Supreme Court of the United States, it must stand as the limit of taxation as much for the State in terms of what it may validly collect and distribute as for its citizens in terms of what must be paid. The Supreme Court of Ohio may no more restrict what the State of Ohio may collect under the federal Import-Export Clause than it may expand an Ohio citizen's tax liability beyond the limits therein described. Yet, in the Ohio Supreme Court opinion dated July 11, 1973, the carefully and consistently developed definition of "export" was swept away.

The question presented is substantial as it represents an unwarranted and significant erosion of the decisions of the Supreme Court of the United States. The consequences of the new definition of export warrant the application of this Court's logic and guidance, not only in terms of the Ohio question, but in terms of all jurisdictions that may subsequently react to the silence of this Court if the federal question is not heard. Therefore,

this case merits plenary review by the Supreme Court of the United States.

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APPENDIX A

THE NATIONAL CASH REGISTER CO., APPELLANT, *v.* KOSYDAR, TAX COMMR., APPELLEE.

[Cite as National Cash Register Co. v. Kosydar (1973), 35 Ohio St. 2d 166.]

Taxation — Tangible personal property — Exemption — Section 10, Article I, Constitution—Prohibition against state tax on exports—Test—Machines designed and built exclusively for foreign consumers—Exempt as "exports."

(No. 72-479—Decided July 11, 1973.)

APPEAL FROM THE BOARD OF TAX APPEALS

This is an appeal by The National Cash Register Company from a decision of the Board of Tax Appeals, the effect of which was the upholding of a tax assessment made by the Tax Commissioner with respect to the company's 1968 inter-county corporation return of taxable property.

In that return, and before the Board of Tax Appeals, National Cash Register (NCR) contended that certain of its machines had, at the time they were included in the company's taxable inventory and their value assessed for tax purposes by the Tax Commissioner, become irrevocably committed to exportation and had commenced the journey which would lead necessarily and undeniably to their exportation from the United States. Therefore, NCR contended, the inclusion of the machines in the taxable inventory pursuant to Ohio personal property law was a violation of Section 10, Clause 2 of Article I of the United States Constitution, the Import-Export Clause.

NCR, a Maryland corporation, has its world headquarters, main production facility and warehouse in Dayton, Ohio. For many years it has engaged in the manufacture of cash registers, accounting machines and electronic data processing systems, which it markets throughout the United States and in 120 foreign countries. For marketing purposes, the company is organized into two major divisions, domestic and international, each totally separated from the other. The international marketing division has its own chief executive, a "group vice-president" responsible only to the president of NCR, and its own accounting staff, sales force, product line, and physical facility. With respect to inventory, the division maintains its own record control system and packaging processes for its products.

At the hearing before the Board of Tax Appeals, the international division's vice-president described the general marketing process, as follows:

"* * * The first thing that the salesman would have to do, of course, is to get the customer's interest and secure the permission of the customer to discuss his business with him, with the ultimate objective of being able to make a detailed survey of the customer's business to find out if there was a need for our product.

"Once that need had been established, the salesman would decide how best to take an NCR product * * * and build that product to meet the customer's individual requirements * * *."

He testified further that if an order is placed it is sent to the factory in Dayton, where the product is then manufactured. NCR maintains no inventory of machines which are available to meet incoming orders from foreign customers. An order form from a foreign customer will indicate the class of machine and the individual model to be

purchased, the basic construction of the individual machines, the number of machines ordered, their destination, and the terms of the sale. Each order is accompanied by a building instruction sheet, prepared by the individual salesman in the foreign country with the assistance of technical people in that country, which specifies, primarily, the indivdual functions the machines are to peform according to the peculiar commercial and individual requirements of the customer. No order is accepted in Dayton without a building instruction sheet attached to it.

When the order and the building instruction sheet are received by NCR, a factory work order is prepared. The work order contains the necessary production language to enable the factory to build the machine to the exact specifications of the customer. A work order covers every machine manufactured. After a machine has been produced it goes to final inspection for determination that it has been built to specification, and finally is packed and crated to withstand the unusual rigors of export shipment.

The crated machines are then taken to an NCR warehouse in Dayton to await shipment. It was the Tax Commissioner's assessment of the items in that international inventory as of December 31, 1967, tax lien date, which gave rise to this action.

The record reveals that NCR maintains an international inventory for several reasons. Many countries will not allow a partial shipment, so when a large order has been placed and the production cycle is only two or three machines a day, the machines must be consolidated and stored prior to shipment. In the electronic data processing area, the component parts of a system may be produced at several different locations, which also necessitates a con-

solidation prior to shipment. In many instances, NCR is unable to obtain an importation license from the country to which the machines are to be shipped at the time the shipment is ready, even though the country of destination may have agreed to supply one at the time the order was placed. Importation licenses are usually tied to the foreign exchange situation in the particular country, which is often impossible to predict. In one instance, a license was delayed for three years due to a balance-of-payments problem. Related difficulties involve local fluctuations in currency value, availability of foreign currency and unforeseen delays in obtaining letters of credit. The pitfalls in the operation of the international division are numerous, complicated and completely beyond the ability of NCR to predict with any degree of consistency.

The uncontroverted record establishes that no piece of equipment built for the international division has ever gone into any area other than the international division; that there is no recorded instance where a machine sold to a foreign purchaser was returned; and that no exported item has ever found its way back into the United States market. Likewise, it was uncontroverted that due to unique construction and special adaptation for foreign use, machines marketed by the international division were not merely noncompetitive in the United States market, but were not saleable there. The reasons for this include complex technical variations in keyboards, wiring, detents and motors; and, specifically as to cash registers, variations in dispensers, the amount of characters on the keys and in the windows and in the decimal point placement. There was evidence that electrical current varied from country to country, even in parts of the same country, in terms of standard voltage and cycles and, in some instances, as between AC and DC current. There

was also testimony that the degree of merchandising control in the retailing field in the United States was technically superior to that of other countries by ten years, making machines produced for foreign customers obsolete in the domestic market.

Further, an NCR export product could not economically be converted for domestic sale. Against the company's profit margin of approximately five percent per unit, the changeover cost would be approximately 16 percent per unit, rendering the possibility of a changeover totally unfeasible.

Upon the basis of all those factors, NCR urged that the machinery in the international inventory enjoyed an export status and should not be taxed. However, based mainly upon federal cases, the Board of Tax Appeals in its decision said:

"* * * two judicially articulated criteria * * * must exist concurrently for personal property to be exempt from state taxation as an export:

"(1) the property must have started on its journey to a foreign destination

"(2) the property must be irrevocably committed to export."

Unable to find any evidence that NCR had met the first test, or that compliance with the second test alone was enough, the board affirmed the assessment order with respect to the international inventory.

The cause is now before this court pursuant to an appeal as a matter of right by NCR.

Messrs. Dargusch & Day and Mr. Roger F. Day, for appellant.

Mr. William J. Brown, attorney general, *Mrs. Maryann B. Gall* and *Mr. Peter Stratigos*, for appellee.

PER CURIAM

Section 10, Clause 2 of Article I of the United States Constitution provides: "No state shall, without the consent of the Congress lay any imposts or duties on imports or exports * * *." This case requires us to determine whether the machines in NCR's international inventory, which were assessed by the Tax Commissioner, were "exports" within the meaning of that clause.

In answering that question, the Board of Tax Appeals applied a mechanistic, two-fold formula which it culled from phrases found in the leading "export" cases. *Coe* v. *Errol* (1886), 116 U. S. 517; *A. G. Spalding & Bros.* v. *Edwards* (1923), 262 U. S. 66; *Richfield Oil Corp.* v. *State Board of Equalization* (1946), 329 U. S. 69; *Joy Oil Co.* v. *State Tax Commission* (1949), 337 U. S. 286; *Empresa Siderurgica* v. *County of Merced* (1949), 337 U. S. 154; *Hugo Neu Corp.* v. *County of Los Angeles* (1970), 7 Cal. App. 3d 21, 86 Cal. Rptr. 332; *Rice Growers' Assn. of California* v. *County of Yolo* (1971), 17 Cal. App. 3d 227, 94 Cal. Rptr. 847; *Cargill of California* v. *County of Yolo* (1972), 26 Cal. App. 3d 704, 103 Cal. Rptr. 257. A majority of this court, however, is of the opinion that the instant case is particularly ill-fitted for a mechanical disposition.

The cases from which the two criteria for immunity from taxation were extrapolated by the board embraced products which were completely fungible or were viewed as such. In that situation, we can agree that nothing less than delivery to a carrier, marking the commencement of movement in the export stream, will suffice to guarantee that the process of exportation has been irreversibly initiated. This case, on the other hand, involves cash registers, accounting machines, and electronic data processing systems which have been ordered, designed and built exclusively to serve the peculiar needs of specific

foreign consumers. It is uncontradicted on the record that, in every material respect, the machines involved herein are useless in the domestic market and never find their way there. Of all the cases examined, we were unable to find any situation where the "certainty of export" has been more clearly demonstrated than in this case*; the degree of certainty here exemplified is fully equivalent to that which attends the delivery of fungible goods to a carrier for the start of a journey to a foreign destination.

The decision of the Board of Tax Appeals is reversed, except as to that portion of the assessment which relates to items destined for sale in the possessions or territories of the United States. As to such latter assessment, the decision of the board is affirmed.

DECISION REVERSED IN PART AND AFFIRMED IN PART

HERBERT, CORRIGAN, STERN, CELEBREZZE and W. BROWN, JJ., concur.

O'NEILL, C. J., and P. BROWN, J., dissent.

O'NEILL, C. J., dissenting. I dissent on authority of R. C. 5709.01 and the cases decided by the United States Supreme Court involving Section 10, Clause 2 of Article I of the United States Constitution. See *Coe* v. *Errol* (1886), 116 U. S. 517; *A. G. Spalding & Bros.* v. *Edwards* (1923), 262 U. S. 66; *Richfield Oil Corp.* v. *State Board of*

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*Of perhaps equal certainty was the DDT in *Montrose Chemical Corp.* v. *County of Los Angeles* (1966), 243 Cal. App. 2d 300, 52 Cal. Rptr. 209 (cert. den. 386 U.S. 1004). But, see, *Rice Grower's Assn. of California* v. *County of Yolo* (1971), 17 Cal. App. 3d 227, 94 Cal. Rptr. 847.

Equalization (1946), 329 U. S. 69; *Joy Oil Co.* v. *State Tax Commission* (1949), 337 U. S. 286; *Empresa Siderurgica* v. *County of Merced* (1949), 337 U. S. 154.

R. C. 5709.01 provides, in pertinent part:

"* * * *All personal property located* and used in business *in this state* * * * [is] *subject to taxation* * * *." (Emphasis added.)

This tax applies to all property manufactured to order and "then taken to * * * [a] warehouse * * * to await shipment," whether that shipment is to be made to Columbus, Buffalo, San Francisco, or a foreign country.

The revenue raised by the tax imposed upon this property is used in accordance with law to pay for the local services of government by counties, municipalties, townships and health districts and for the operation of schools provided for the benefit of all private and corporate businesses and the citizens of the local communities in which those businesses are located.

The appellant in this case understandably would like to be relieved of its share of the taxes for the support of schools and local government upon its inventory awaiting shipment. Appellant contends that it is in a different position from all other manufacturers of products for both domestic and foreign shipment.

The only basis on which the appellant can claim immunity from this tax on its personal property inventory "stored prior to shipment" or "taken to an NCR warehouse in Dayton to await shipment" is that the tax imposed by the General Assembly of Ohio upon all personal property is unconstitutional under the provisions of Section 10, Clause 2 of Article I of the United States Constitution as to appellant's property, even though it is valid as to all other manufacturers' property awaiting shipment in warehouses.

No case decided by the United States Supreme Court supports appellant's position. In my opinion, it is easy to determine why this is true.

The sole issue in this case is: When does the exemption from taxation provided in the export-import clause of the United States Constitution attach to the goods?

The controlling rule of law in this regard is succinctly stated by Mr. Justice Frankfurter in *Joy Oil Co.* v. *State Tax Comm.* (1949), 337 U. S. 286, at page 288, as follows:

"The Export-Import Clause was meant to confer immunity from local taxation upon property being exported, not to relieve property eventually to be exported from its share of the cost of local services. See *Coe* v. *Errol*, 116 U. S. 517, 527-28."

As Justice Frankfurter said in *Joy Oil Co., supra*:

"The circumstances which tended, at the time when the tax was assessed, to establish petitioner's intent to export the gasoline and the fact that the gasoline was eventually exported are not enough, by themselves, to confer immunity from local taxation. See, *e. g.*, *Cornell* v. *Coyne*, 192 U. S. 418; *Empresa Siderurgica* v. *County of Merced*, 337 U. S. 154."

So in the instant case, the circumstances which tended, at the time the tax was assessed, to establish (1) petitioner's intent to export, (2) the certainty of export if a profit was to be made from the manufacture of the property, and (3) the fact that all similar property manufactured by the company in the past had been exported eventually are not enough, by themselves, to confer immunity from local taxation.

The appellant places emphasis upon the argument that many of the United States Supreme Court cases holding goods not immune from local taxes have so held because

of possible diversion of the goods to the domestic market. It is asserted that those cases involved fungible goods, while the machines in the instant case, because of their character, were not saleable in the domestic market, were not fungible, and were not divertible, and, therefore, should be exempt from local taxation. Such a fungible-goods argument may have some validity once the process of exportation has started and the exemption has attached to the goods. Then and only then, under the cases, does the question arise as to the certainty of the goods completing the process and reaching the foreign destination as against the possibility of being diverted to the domestic market. See, *e. g., Joy Oil Co., supra; Empresa Siderurgica, supra.* However, the fungible-goods argument is not relevant to the question presented in the instant case.

The factual question of fungible or nonfungible goods plays no part in a determination of when the process of exportation begins, *i. e.*, when the exemption initially attaches. See *A. G. Spalding & Bros. v. Edwards* (1923), 262 U. S. 66.

The intent to export clearly is not sufficient to commence that process and change a machine stored awaiting shipment into an export. *E. g., Joy Oil Co., supra.* The certainty of export is not sufficient to convert property in a warehouse awaiting shipment to an export. *Empresa Siderurgica, supra* (cement plant parts crated awaiting shipment overseas held not exports and not immune from local taxes). The fact that the machines were made to order for a foreign market or that such machines have always been shipped overseas eventually does not make a product stored in a warehouse awaiting shipment an export exempt from taxation. *Cf. Coe* v. *Errol, supra; Hugo Neu Corp.* v. *County of Los Angeles* (1970), 7 Cal. App. 3d 21, 86 Cal. Reptr. 332.

If the above were true, the argument could be made with equal logic and force that all property stored in the factory awaiting manufacture of a machine, or certainly all property in process of manufacture into a machine, is exempt. No doubt the General Assembly could exempt such property from local taxes for local services, but it has not done so.

Argument is advanced by the appellant, in brief, that a change in the law extending the exemption from taxes would serve a useful purpose with regard to national monetary or trade policy. For this court to ground its decision upon such unexpressed reasons is contrary to the settled law that acts of the General Assembly are presumed to be constitutional unless clearly in violation of constitutional provisions. R. C. 1.47(A); *State, ex rel. Dickman,* v. *Defenbacher* (1955), 164 Ohio St. 142, 128 N. E. 2d 59.

The machines in this case meet the requirement of goods destined for foreign commerce. They were ordered by a foreign customer. Once the process of exportation is commenced, a persuasive argument could be made that they are certain to be exported and, therefore, exempt.

However, at the time the tax was assessed the exemption had not attached to the articles as required by law because they were simply stored awaiting shipment—title and possession was in the appellant, payment had not been made, no export license issued, no letter of credit authorized, and the machines were in complete control of appellant; but, most important, there was no movement of goods, no shipment, no process of exportation. There is no certainty of export. The record establishes that some machines have remained stored in the warehouse awaiting shipment for three years. The orders could be cancelled, the export license might never issue,

the financing may fail to materialize, the machines could be destroyed, dismantled or sold for scrap. These machines were no different from any other mass of goods in a warehouse awaiting shipment. They were not an export exempt from local taxes until they moved—in plain language, until they were shipped or at least moved to or into a means of transportation. *Empresa Siderurgica* v. *County of Merced, supra; Joy Oil Co., supra.*

The objection is made that this is a "mechanistic" concept. (See dissenting opinion in *Empresa Siderurgica, supra.*) I can not agree. The court has held that the exemption attaches to the articles or the goods. The time at which it attaches must be established. *A G. Spalding & Bros.* v. *Edwards, supra.* The rule expressed by the majority fails to deal with this fundamental question. It leaves vague and unanswered the real question in the case which is: At what point did the machines become "exports" exempt under the Export-Import Clause?

P. BROWN, J., concurs in the foregoing dissenting opinion.

APPENDIX B

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,)
) **1973 TERM**
City of Columbus.) **To wit: September 6, 1973**

NATIONAL CASH REGISTER CO.,

Appellant,

vs.

ROBERT J. KOSYDAR, TAX COMMR.,

Appellee.

No. 72-479

REHEARING

It is ordered by the court that rehearing in this case is denied.

I, THOMAS L. STARTZMAN, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No._____Page_____

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 6th day of September, 1973.

THOMAS L. STARTZMAN, *Clerk.*

*By*_____*Deputy.*

APPENDIX C

BEFORE THE BOARD OF TAX APPEALS
DEPARTMENT OF TAXATION
STATE OF OHIO

THE NATIONAL CASH REGISTER COMPANY
Main and K Streets
Dayton, Ohio 45409

Appellant

vs.

ROBERT J. KOSYDAR
Tax Commissioner of Ohio

Appellee

No. 71-02-0330

PERSONAL PROPERTY TAX

(Tangible)

APPEARANCES: For the Appellant:

Dargusch and Day
by L. Orin Slagle, Jr.
and Roger Day
218 East State Street
Columbus, Ohio 43215

For the Appellee:

William J. Brown,
Attorney General
by Peter Stratigos, Assistant
State House Annex
Columbus, Ohio 43215

This cause and matter came on to be considered by the Board of Tax Appeals upon a notice of appeal filed herein by the above named appellant under date of February 23, 1971, from a final assessment certificate of valuation on Inter County Corporation Tangible Personal Property dated January 29, 1971, for the tax return year 1968, in which a deficiency of $1,477,700 is shown for Dayton Taxing District, Montgomery County, Ohio.

Appellant filed its notice of appeal from said assessment and in pertinent part said notice reads as follows:

> "Pursuant to Section 5715.02, of the Revised Code of Ohio, The National Cash Register Company, hereinafter "NCR", gives notice of its appeal to the Board of Tax Appeals, from a Final Assessment Certificate of Valuation for Montgomery County, issued with respect to Ohio Personal Property tax return year 1968, and bearing the date of January 29, 1971. A true and correct copy of the Certificate is attached hereto, made a part hereof, and incorporated by specific reference. Such Certificate is erroneous, in that it:
>
> (1) Disallows a claim for reduction from Schedule 3, of idle, obsolete and unsaleable inventory (identified as Account No. 322530). Such inventory consists of used machinery, originally manufactured by NCR, and subsequently returned to it for various reasons. The Tax Commissioner erred by assessing such inventory in excess of its true value in money. See Section 5711.18 of the Revised Code of Ohio.
>
> (2) Disallows a claim for reduction from Schedule 3, of inventory held for export. Such inventory consists of new machines, manufactured by NCR solely for export. The Tax Commissioner erred by assessing such inventory in violation of Article I, §10, Clause 2, of the Constitution of the United States.

Because of the errors stated above, NCR requests that the Commissioner's determinations be reversed as unreasonable and unlawful, and that final judgment be entered in its favor."

At the hearing before the Board of Tax Appeals, appellant abandoned its claim under item (1) of its notice of appeal leaving only the item (2) in contention. Both items 1 and 2 began as claims for deduction from book value in which the claim for deduction for export inventory which was added back by the agent for the Tax Commissioner amounted to $2,159,035 at 50% listed value for $1,079,520.

The matter was submitted to the Board of Tax Appeals upon the notice of appeal, the statutory transcript furnished by the Tax Commissioner, the testimony and evidence presented to the Board of Tax Appeals at a hearing in Columbus, Ohio, on August 5, 1971, and the briefs supplied by counsel.

For many years, the appellant has engaged in the manufacture of cash registers, accounting machines and electronic data processing systems, which it markets throughout the United States and in 120 countries abroad. Its home offices, main producing facility and warehouse are located in Dayton, Ohio. In marketing its products, NCR has two Main divisions. One is known as domestic marketing and the other is known as international marketing. Although the two divisions are not separately incorporated, there is total separation of the international operation of NCR from its domestic operations. Each division is headed up by a group Vice President, who reports directly to the President of the company. Each is housed in a separate facility and has its own accounting staff and sales force. With respect to inventory, each division has its own record control system and products that

are packaged for export from the plant or warehouse have identifiable packaging from products packaged for domestic delivery.

The only inventories of items destined for exportation, which NCR maintained in Ohio in 1967 were located in Dayton, Ohio. These inventories consisted of cash registers, accounting machines and electronic data processing equipment, all of which had been contracted for purchase by foreign buyers prior to manufacture.

Each machine is custom built to accommodate commercial peculiarities of the particular country to which it is to be shipped and of the individual consumer.

The ultimate objective of an NCR salesman when calling on a foreign customer is to determine from a detailed survey of the customer's business if there is any need for an NCR product. Once a need has been established, the salesman decides how best to build an NCR product to meet the customer's individual requirements in that foreign country.

If an order is placed, it is sent to the factory at Dayton, Ohio, where the product is custom-built for the foreign buyer. NCR has no inventory of products already constructed to meet an order when it arrives at Dayton.

Each order is accompanied by a building instruction sheet when it arrives at Dayton on which is a model number followed by a series of numbers. The model number indicates the country to which the product is to be shipped and the following series of numbers describes in code the individual functions the machine is to perform. The building instructions sheet is prepared by the individual salesman in the foreign country with the assistance of technical people in that country. No order can be accepted by NCR without this sheet.

When a foreign order along with the necessary accom-

panying documents is received by NCR, a factory work order card is prepared. This card contains the necessary production language to enable the factory to build the machine to the exact specifications of the customer.

After a machine has been produced pursuant to the customer's specifications, it goes to final inspection for determination that it, in fact, has been built as specified on the factory work order card. The machine is then packed for export shipment.

Machines packed for export shipment are readily distinguished from those packed for domestic shipment. Most of the equipment sold in the United States is packaged in cardboard boxes; however, export equipment is sealed in very heavy plastic moistureproof covers and packed in wood crates, which are reinforced by wire bands and steel straps. In addition, the machine's foreign destination is stenciled on the side of the crate.

The crated machines are then taken to an NCR warehouse to await shipment. In 1967, the international inventory was housed in Dayton, Ohio. There are several reasons why NCR maintains an international inventory. Many countries will not allow a partial shipment or, often a country has a balance-of-payments problem and will not issue an import license until a later date. In other cases, a letter of credit may be held up or necessary transportation may not be available.

It was the opinion of appellant's witness that due to their unique construction and special adaptation for foreign use, these machines are not salesable domestically, that an item destined for an export customer and exported by NCR never finds its way back into the United States. NCR has had no machine sold to a foreign purchaser which has been returned.

The testimony was that a cash register destined to be exported to Japan, for example, would not be saleable in the United States. The keyboard is used to record yen, rather than dollars. The decimal point is after the third column, rather than the second. Because there are 350 yen to a dollar, the machine is capable to recording a transaction of 99,999,999 and that a machine with such a high capacity has no application in this country. Furthermore, the keys, printing mechanism, and indicators appearing in the window are in Chinese characters. The motor and electrical system is designed specifically for Japan. Japan uses 100 volt current, whereas 110-120 is standard in the United States. If a machine designed for Japan were plugged into U. S. current, the motor would ultimately burn out. Many machines exported to Japan are designed to run on 50 rather than the 60 cycle current employed in the United States. If a machine designed to run on 50 cycle current were plugged into a current with 60 cycles, you would get a slow operation, which would make the machine add wrong because of the change in cycling time. The same is true of all NCR export products including accounting machines and electronic data processing systems.

Many machines are equipped for special functions such as automatic change making. Such a mechanism will not operate in the United States because the attached dispenser is denominated for foreign coins, which are entirely different from the denomination of coins in this country.

The testimony was that more than the mere mechanics makes an export machine unsaleable in the United States. In the United States and in the retailing field, the marketing philosophy is different from that in most countries throughout the world. The techniques here are perhaps

ten years ahead of most countries in Europe at the moment. For example, many domestic consumers demand automatic reorder systems, which feed data from the cash register into a computer network. These systems would be unavailable on export models.

The testimony further was that an NCR export product could not *economically* be converted by NCR for sale domestically. Such conversion would require the machine to be sold at a price which could not be competitive with a machine that was originally manufactured and produced for domestic consumption.

The United States Constitution, Article I, Section 10, Clause 2 provides that:

> "No State shall without the consent of Congress, lay any Imports or duties on Imports or Exports, except what may be absolutely necessary for executing its inspection laws ***"

The tax herein involved is an ad valorem tax levied upon all personal property located and used in business in this state.

The very able briefs filed by counsel discuss at length the elements necessary for personal property to acquire the status of an export. Many cases are cited and considered but all are other than Ohio cases. Most are Federal cases and through all of these cases run two judicially articulated criteria which must exist concurrently for personal property to be exempt from state taxation as an export:

(1) the property must have started on its journey to a foreign destination

(2) the property must be irrevocably committed to export.

It is appellant's contention that actually only the second is necessary but that if the first is required then its movement to its warehouse is sufficient.

With this the Board of Tax Appeals does not agree. From a careful study of the cases cited it is clear that there are many variables considered by the Courts as to when the movement begins but nowhere is it said that the second test alone is sufficient.

Giving consideration to the facts, the case law, the constitutions, statutes and the very able briefs and arguments of counsel, it is the decision of the Board of Tax Appeals that the final assessment certificate of valuation herein must be, and hereby is, affirmed.

I hereby certify the foregoing to be a true and correct copy of the action of the Board of Tax Appeals of the Department of Taxation, this day taken, with respect to the above matter.

ARTHUR W. MOORE, Secretary

STATE OF OHIO
DEPARTMENT OF TAXATION

INTER-COUNTY CORPORATION
TANGIBLE PERSONAL PROPERTY

PRESCRIBED TAX FORM NO. 947-F

TAXPAYER'S NAME

NATIONAL CASH REGISTER COMPANY
MAIN & K STREETS
DAYTON, OHIO 45409

ACCOUNT NUMBER	DATE	RETURN YE/
6739575	1/29/71	1968.

FINAL ASSESSMENT CERTIFICATE OF VALUATION

TO THE AUDITOR - This is to certify that the Tax Commissioner has, pursuant to Sec. 5711.26, R.C., fixed the FINAL assessed value of tangible personal property of this company and apportioned it to your county as set forth below.

CO.	TAXING DISTRICT	TOTAL FINAL ASSESSED VALUE	TOTAL PREVIOUSLY ASSESSED VALUE	DEFICIENCY	PENALTY AND ADD. CHARGES	TOTAL DEFICIENCY	EXCESS
57	DAYTON	78,014,300	76,536,600	1,477,700		1,477,700	

PER FINDINGS OF FIELD AUDIT
CLAIM FOR DEDUCTION ALLOWED IN PART
THIS FINAL ASSESSMENT AUTHORIZED BY THE TAX COMMISSIONER ON JANUARY 29, 1971
AMENDS ASSESSMENT OF AUGUST 7, 1968

ALL OTHER VALUES PREVIOUSLY ASSESSED REMAIN UNCHANGED

NOTICE TO TAXPAYER - In the event of any objection to any deficiency or excess, Petition on Appeal (Sec. 5717.02 R.C.) must be filed with the Board of Tax Appeals within thirty days after mailing of this notice. Remit to County Treasurer upon receipt of bill based on values above.

Robert J. Kegler
TAX COMMISSIONER

TAXPAYER'S COPY

APPENDIX D

APPENDIX E

IN THE SUPREME COURT OF OHIO

Appeal From the Board of Tax Appeals

NATIONAL CASH REGISTER CO.,
Appellee,

vs.

ROBERT J. KOSYDAR, TAX COMMISSIONER OF OHIO,
Appellant.

Case No. 72-479

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice hereby is given that Robert J. Kosydar, Tax Commissioner of Ohio, the appellant above-named, appeals to the Supreme Court of the United States from the final order of the Supreme Court of the State of Ohio, entered September 6, 1973, denying appellant's motion for rehearing and thereby affirming judgment for appellee entered pursuant to its opinion of July 11, 1973.

This appeal is taken pursuant to 28 U.S.C. Section 1257 (2).

WILLIAM J. BROWN
Attorney General of Ohio
Counsel for Appellant
ROBERT J. KOSYDAR
Tax Commissioner of Ohio

DWIGHT C. PETTAY, JR.
Assistant Attorney General
MARYANN B. GALL
Assistant Attorney General

AFFIDAVIT OF SERVICE

STATE OF OHIO)
) SS:
COUNTY OF FRANKLIN)

Maryann B. Gall, Assistant Attorney General, being first duly sworn, deposes and says she is Counsel for Robert J. Kosydar, Tax Commissioner of Ohio, appellant herein; that she did, on the 12th day of September, 1973, serve a copy of the within Notice of Appeal upon Roger F. Day, Counsel for National Cash Register Co., appellee herein, by delivery of the same personally to him at his office, Columbus, Ohio, in conformity with Rule 33 (3) (C) of the Rules of the Supreme Court of the Supreme Court of the United States; and that all parties required to be served have been served.

MARYANN B. GALL

Sworn to before me and subscribed in my presence at Columbus, Ohio, this 12th day of September, 1973.

JOHN S. DUFFY, JR.
Attorney at Law
Notary Public
State of Ohio

APPENDIX F

5709.01 Taxable property entered on general tax list and duplicate.

All real property in this state is subject to taxation, except only such as is expressly exempted therefrom. All personal property located and used in business in this state, and all domestic animals kept in this state and not used in agriculture, except unmanufactured tobacco which shall be exempt from taxation for state purposes to the extent of the value, or amounts, of any unpaid nonrecourse loan or loans thereon granted by the United States government or any agency thereof, are subject to taxation, regardless of the residence of the owners thereof. All ships, vessels, and boats, and all shares and interests therein, defined in section 5701.03 of the Revised Code as personal property and belonging to persons residing in this state, and aircraft belonging to persons residing in this state and not used in business wholly in another state, other than aircraft licensed in accordance with sections 4561.17 to 4561.21, inclusive, of the Revised Code, are subject to taxation. All property mentioned as taxable in this section shall be entered on the general tax list and duplicate of taxable property.

5711.13 Corporation shall make combined return; assessment; certification to auditor of state.

A corporation having taxable property required to be listed in more than one county shall make a combined return to the tax commissioner listing all its taxable property in this state, in conformity with sections 5711.01 to 5711.36, inclusive, of the Revised Code, but it shall not assign its property of the kinds mentioned in section 5709.02 of the Revised Code to any particular taxing district or county. The commissioner shall assess the per-

sonal property of such corporation in the several taxing districts in which it is required by sections 5711.01 to 5711.36, inclusive, of the Revised Code, to be assessed, and shall issue assessment certificates therefor to the proper county auditors at the time and in the manner required by section 5711.25 of the Revised Code. All other property of such corporation required to be so listed shall be entered on the intangible property tax list in the office of the auditor of state and the duplicate thereof in the office of the treasurer of state and taxed under section 5707.03 of the Revised Code. The commissioner shall assess all other property of each corporation, and, on or before the third Monday of May, annually, shall certify the total value or amount of each kind thereof to the auditor of state, who shall enter same on the intangible property tax list in his office in the manner provided in sections 5725.01 to 5725.26, inclusive, of the Revised Code. Sections 5711.01 to 5711.36, inclusive, of the Revised Code, shall apply to and govern such corporation, its proper officers and representatives, the commissioner, and the county auditor as to all proceedings in the assessment of the property of such corporation.

AFFIDAVIT OF SERVICE

STATE OF OHIO)
) ss:
COUNTY OF FRANKLIN)

Maryann B. Gall, Assistant Attorney General, being first duly sworn, deposes and says she is Counsel for Robert J. Kosydar, Tax Commissioner of Ohio, appellant herein; that she did, on the ___ day of October, 1973, serve three copies of the Jurisdictional Statement upon Roger F. Day, Counsel for the National Cash Register Company, appellee herein, by delivery of the same personally to him at his office in Columbus, Ohio, in conformity with Rule 33(3)(C) of the Rules of the Supreme Court of the United States; and that all parties required to be served have been served.

MARYANN B. GALL

Sworn to before me and subscribed in my presence at Columbus, Ohio, this ___ day of October, 1973.

JOHN C. DUFFY, JR.
Attorney at Law
Notary Public, State of Ohio

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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1973

No. 73-629

THE NATIONAL CASH REGISTER CO.,
Appellee,

vs.

ROBERT J. KOSYDAR,
TAX COMMISSIONER OF OHIO,
Appellant.

On Appeal from the Supreme Court of Ohio

MOTION TO DISMISS

ROGER F. DAY
218 East State Street
Columbus, Ohio 43215
Attorney for Appellee.

Of Counsel
DARGUSCH & DAY
Columbus, Ohio

MIDWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus, Ohio 43215

IN THE

Supreme Court of the United States

OCTOBER TERM 1973

No. 73-629

THE NATIONAL CASH REGISTER CO.,
Appellee,

vs.

ROBERT J. KOSYDAR,
TAX COMMISSIONER OF OHIO,
Appellant.

On Appeal from the Supreme Court of Ohio

MOTION TO DISMISS

The appellee moves the Court to dismiss the appeal because it does not present a substantial federal question and does not present any issue meriting plenary review by this Court.

ARGUMENT

State tribunals, responsive as they must be to local electorates, are never predisposed to sacrifice local revenues to tax immunities, whether these immunities are provided by state statutes or dictated by the United States Constitution. As a consequence, only the strongest cases involving claims of tax immunity survive the state appellate process and the instant case is one of

them. Here the Supreme Court of Ohio was completely convinced by the Record made that the UNIQUE machines of National Cash Register Company are irrevocably and irretrievably committed to the export process and thus are constitutionally immune from Ohio's ad valorem personal property tax under Article I, Section 10, Clause 2, of the United States Constitution.

The decision rendered by the Ohio Court was based on the uncontroverted facts regarding the machine themselves, all of which proved the certainty of their export. Although appellant's Jurisdictional Statement completely neglects mention of these facts, the Supreme Court of Ohio found them sufficiently important to merit four pages of its opinion. When these facts are examined it will be seen that the machines in question are highly sophisticated electronic data processing systems, accounting machines and cash registers. All have been custom manufactured pursuant to special foreign orders and tailored to fit the individual needs of foreign customers in many foreign lands. All have been segregated from domestic goods and moved from production areas to a warehouse. All have then been specially packaged for export shipment. Without any exception whatever, all warehoused machines are later sent to their foreign destinations and none has ever found its way back into the United States. **DUE TO THEIR UNIQUE PHYSICAL CONSTRUCTION AND SPECIAL ADAPTATION FOR FOREIGN USE, THE MACHINES INVOLVED ARE USELESS IN THE DOMESTIC MARKET.**[1]

---

[1] The decision of the Ohio Court points out that the machines were "not merely noncompetitive in the United States, but were not saleable there. The reasons for this include complex technical variations in keyboards, wiring, detents and motors; and specifically as to cash registers, variations in dispensers, the amount of characters on the keys and in the windows and in the decimal point placement. There was evidence that electrical current varied from country to country, in terms of standard voltage and cycles and, in some instances, as between AC and DC current."

At the time the NCR machines were taxed by Ohio they were in the warehouse committed to shipment abroad. This warehousing was required for reasons predominantly beyond control of National Cash Register. As pointed out by the Ohio Court, many foreign countries will not allow a partial shipment and therefore as the machines are manufactured they must be consolidated prior to shipment. In many instances NCR is unable to obtain an import license from the country to which the machines are to be shipped at the time the shipment is ready, even though the country of destination may have agreed to supply one at the time the order was placed. Import licenses are usually tied to the foreign exchange situation in the particular foreign country, which is often impossible to predict. Related difficulties involve local fluctuations in currency values and availability of foreign currency.

In rendering its decision, the Supreme Court of Ohio carefully weighed all these facts, and others, and because of them concluded that the NCR machines were commited to the export process beyond any doubt. The Court expressed its conviction in these words:

> "Of all the cases examined, we were unable to find any situation where the 'certainty of export' has been more clearly demonstrated than in this case . . . ."

The appellant Tax Commissioner of Ohio asserts a substantial federal question is presented by this case. The sole contention made is that constitutional immunity from state taxation should be afforded export goods only if, and only when, such goods have been loaded aboard a carrier and commenced their physical journey abroad. Appellant insists, essentially, that a state court must close its eyes to all other facts that may equally prove irrevocable commitment to the export process. Admittedly, delivery to a carrier has been one evidentiary

test applied by the Supreme Court of the United States in several prior cases to answer the question of when goods become exports shielded from taxation by the Constitution. *A. G. Spalding & Bros. v. Edwards*, 262 U.S. 66 (1923); *Richfield Oil Corp. v. State Board of Equalization*, 329 U.S. 69 (1946); *Joy Oil Co. v. State Tax Commission*, 337 U.S. 286 (1949); *Empresa Siderurgica v. County of Merced*, 337 U.S. 154 (1949). Each of these cases, however, involved property which was by its very nature fungible and from a physical standpoint, completely capable of being diverted to and used within the domestic market (baseballs and bats; oil; gasoline; cement plant and related equipment). Therefore, in those instances, nothing less than physical delivery of the goods to a carrier could unequivocably evidence commitment to the export process and provide positive assurance the goods would never be diverted to domestic use.[2] The Ohio Supreme Court did not subvert these holdings, but instead expressed its complete accord with them. It simply found that the degree of certainty of export for the unique NCR machines was:

> ". . . fully equivalent to that which attends the delivery of fungible goods to a carrier for the start of a journey to a foreign destination."

The language of the Ohio Court's opinion echoes the words of Justice Douglas in *Richfield Oil Corp. v. State Board of Equalization* to the effect that delivery to a

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[2] The concern with diversion to domestic use is well emphasized in the cases cited. *A. G. Spalding & Bros. v. Edwards*, 262 U.S. 66, 70 (1923): "[T]hey might change their mind and retain the balls and bats for their own use." *Richfield Oil Corp., v. State Board of Equalization*, 329 U.S. 69, 83 (1946): [T]here was nothing equivocal in the transaction which created even a probability that the oil would be diverted to domestic use." *Joy Oil Co. v. State Tax Commission*, 337 U.S. 286, 288 (1949): "While in storage, the gasoline might have been diverted to domestic markets . . . ." *Empresa Siderurgica v. County of Merced*, 337 U.S. 154, 157 (1949): "It (the goods in question) might still have been diverted into the domestic market."

common carrier is not the *sine qua non* of export immunity if other facts also conclusively prove commitment to the export process:

> "The certainty that the goods are headed to sea and that the process of exportation has started may normally be best evidenced by the fact that they have been delivered to a common carrier for that purpose. But the same degree of certainty may exist though no common carrier is involved. The present case is an excellent illustration . . . ."
>
> 329 U.S. 69, 82 (1946).

The "certainty" of which Mr. Justice Douglas spoke in *Richfield* is the certainty that the export process has been irrevocably initiated and will not be aborted. This is the true standard of constitutional immunity and all evidentiary tests have value only in measuring the degree of certainty. In the case at bar, the Ohio Supreme Court carefully weighed all the evidentiary facts presented and found the certainty of export for the NCR machines established beyond any doubt.

Finally, it is easy to understand why the appellant's Jurisdictional Statement fails to demonstrate a significant federal question intertwined in this case. It is simply because export immunity from state taxation has never been, is not now, and is not likely to become a troublesome area for either taxing authorities, taxpayers or state courts. Indeed, the very paucity of reported cases throughout the United States involving claims of export immunity amply evidences the unimportance of the federal question. Moreover, when this Court denied certiorari in *Montrose Chemical Corp. v. County of Los Angeles,* 243 Cal. App. 2d 300, cert. den. 386 U.S. 1004, and in *Rice Growers Ass'n. of California v. County of Yolo,* 17 Cal. App. 3rd 227, cert. den. 404 U.S. 941, it indicated that no substantial federal question is pre-

sented by state court decisions reflecting thoughtful and deliberate factual determinations that goods are, or are not, because of the certainty or uncertainty of their exportation, exports subject to the immunity afforded by the Constitution of the United States. Essentially, this is an area of law in which the peculiar facts of each case must dictate the ultimate legal conclusion and no universal evidentiary test can be prescribed. Therefore, appellee respectfully moves the Court to dismiss this appeal.

Respectfully submitted,
ROGER F. DAY
Attorney for Appellee

DARGUSCH & DAY
Columbus, Ohio
Of Counsel

AFFIDAVIT OF SERVICE

STATE OF OHIO)
) ss:
COUNTY OF FRANKLIN)

Roger F. Day, being first duly sworn, deposes and says he is Counsel for National Cash Register Company, appellee herein; that he did on the 23rd day of November, 1973, serve three copies of the foregoing Motion to Dismiss upon William J. Brown, Attorney General of Ohio, Counsel for appellant herein, by delivery of the same to him at his office in Columbus, Ohio, in conformity with Rule 33(3) (C) of the Rules of the Supreme Court of the United States; and that all parties required to be served have been served.

/s/ ROGER F. DAY

Sworn to before me and subscribed in my presence at Columbus, Ohio, this 23rd day of November, 1973.

/s/ Ted B. Clevenger
Attorney at Law
Notary Public, State of Ohio

...URT, U. S.

JAN 26 1974

MICHAEL RODAK, JR., CL

IN THE

Supreme Court of the United States

No. 73-629

OCTOBER TERM, 1973

ROBERT J. KOSYDAR,
TAX COMMISSIONER OF OHIO,
Petitioner,

v.

NATIONAL CASH REGISTER COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF OHIO

BRIEF FOR THE PETITIONER

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Constitutional provision and statutes involved	2
Statement	2
Summary of argument	6
Argument: Personal property is not immune from state taxation unless it has started on its journey to a foreign destination	7
Conclusion	24
Appendix A	25
Appendix B	26

CITATIONS

Cases:

Brown v. *Maryland*, 12 Wheat. 419 (1827) 10

Cargill of California, Inc., v. *County of Yolo*, 26 Cal. App. 3d 704, 103 Cal. Rptr. 257 (1972) 20

Coe v. *Errol*, 116 U.S. 517 (1886) 7, 15

Cornell v. *Coyne*, 192 U.S. 418 (1904) 9

Empresa Siderurgica v. *County of Merced*, 337 U.S. 154 (1949) 14, 15

Gough Industries, Inc., v. *State Board of Equalization*, 51 C. 2d 746, 331 P. 2d 161 (1959) 16

Hugo Neu Corp. v. *County of Los Angeles*, 241 Cal. App. 2d 703, 50 Cal. Rptr. 916 (1966) 17

Hugo Neu Corp. v. *County of Los Angeles*, 7 Cal. Ap. 3d 21, 86 Cal. Rptr. 332 (1970) 18

Joy Oil Co. v. *State Tax Commission*, 337 U.S. 286 (1949) 13, 15

Montrose Chemical Corp. v. *County of Los Angeles*, 243 Cal. App. 2d 300, 52 Cal. Rptr. 209 (1966) 18

National Cash Register Co. v. *Kosydar*, 35 Ohio St. 2d 166, 298 N.E. 2d 559 (1973) 1, 4, 15, 21

Northwestern States Portland Cement Co. v. *Minnesota*, 358 U.S. 450 (1959) 23

Rice Grower's Association of California v. *County of Yolo*, 17 Cal. App. 3d 227, 94 Cal. Rptr. 847 (1971) 19

Richfield Oil Corp. v. *State Board of Equalization*, 329 U.S. 69 (1946) 11, 15

Shell Oil Company v. *State Board of Equalization*, 51 Cal. Rptr. 524, 414 P. 2d 820 (1966) 17

Spalding, A. G. & Bros. v. *Edwards*, 262 U.S. 66 (1923) 10, 12, 15

Turpin v. *Burgess*, 117 U.S. 504 (1886) 8

Union Oil Co. of California v. *City of Los Angeles*, 38 Cal. Rptr. 923 (1964) 16

Constitutional provisions:

United States Constitution,

Article I, Section 9, Clause 5 9

Article I, Section 10, Clause 2 ..... 2, 5, 6, 7

Statutes:

United States Code (28 U.S.C.):

Section 1257(3) 2

Ohio Revised Code:

Section 5709.01 ..... 2, 20

Section 5711.13 ..... 2, 20

Miscellaneous:

Import-Export Clause: A Blanket Prohibition Misapplied, 40 S. Cal. L. Rev. 528 (1967) 22

Ohio Tax Study Commission Report, Chapter IV, 1965-1967 21

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OPINION BELOW

The opinion of the Supreme Court of Ohio (A. 128) is reported at 35 Ohio St. 2d 166, 298 N. E. 2d 559 (1973).

JURISDICTION

The final judgment of the Supreme Court of Ohio denying rehearing was entered on September 6, 1973 (A. 1). A jurisdictional statement was filed on October 10, 1973. On December 17, 1973, the appeal was dis-

missed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari was granted on December 17, 1973. The jurisdiction of this Court rests on 28 U.S.C. §1257(3).

QUESTION PRESENTED

When does the exemption from taxation provided in the Import-Export Clause of the United States Constitution attach to property otherwise taxable under the laws of the State of Ohio?

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The pertinent provision of the United States Constitution is contained in Article I, Section 10, Clause 2:

> "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports and Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress."

The relevant Ohio tax statutes are §5709.01 and §5711.13 of the Revised Code of Ohio, set forth in Appendices A and B, *infra*, at 25 and 26.

STATEMENT

The National Cash Register Company (NCR) has its world headquarters, main production facility, and warehouse in Dayton, Ohio (A. 93, 94).[1] For many years it has engaged in the manufacture of cash registers, accounting

[1] "A." references are to the separately bound Single Appendix. Appendices A and B are bound with this brief.

machines, and data processing systems which it markets throughout the United States and in 120 foreign countries. (A. 56, 57, 90).

For marketing purposes, NCR is organized into two major divisions, domestic and international, each separate from the other. The international marketing division has its own chief executive, a group vice-president responsible only to the president of NCR, and its own accounting staff, sales force, product line, and physical facility. With respect to inventory, the international division maintains its own record control system and packaging processes for its products (A. 56, 94).

When a foreign order is placed with NCR, it is sent to the factory in Dayton where the product is manufactured. NCR maintains no inventory of machines available to meet incoming orders from foreign customers (A. 62, 98). An order form from a foreign customer indicates the type of machine and the individual model to be purchased, the basic construction of the individual machines, the number of machines ordered, their destination, and the terms of sale (A. 60, 61, 62). Each order is accompanied by a building construction sheet prepared by the individual salesperson in the foreign country with the assistance of technical people in that country, which details the functions the machines must perform (A. 59, 65-70).

When the foreign order and the building instruction sheet are received by NCR, a factory work order card is prepared. This enables the factory to build the machine to the exact specifications of the customer (A. 70-72). After a machine is produced and inspected, it is packed for export shipment (A. 72, 73, 98).

The property involved in this case was specifically constructed for foreign customers, finished, crated, and in

storage awaiting foreign shipment in the NCR Dayton warehouse on December 31, 1967, when Ohio personal property tax was assessed against it (A. 88). As of that date,

> "* * * they were simply stored awaiting shipment—title and possession was in [NCR], payment had not been made, no export license issued, no letter of credit authorized, and the machines were in complete control of [NCR]; but, most important, there was no movement of goods, no shipment, no process of exportation. There is no certainty of export. The record establishes that some machines have remained stored in the warehouse awaiting shipment for three years. The orders could be cancelled, the export license might never issue, the financing may fail to materialize, the machines could be destroyed, dismantled or sold for scrap. These machines were no different from any other mass of goods in a warehouse awaiting shipment. * * *"
>
> *National Cash Register Co.* v. *Kosydar*, 35 Ohio St. 2d 166, 175; 298 N. E. 2d 559, 564, 565 (1973) (O'Neill, C. J. dissenting). (A. 138, 139).

NCR maintained an international inventory of goods for several reasons:

(1) To consolidate an entire order, because the foreign country to which the machines are sent will not permit a partial shipment. (A. 88);

(2) To await the availability of particular foreign currency without which an importation license will not issue. (A. 88, 89);

(3) To await the issuance of a letter of credit. (A. 89).

Nevertheless, and essentially on the grounds that the machines produced for export were built only to order and to foreign specifications, NCR appealed the Tax Commissioner's assessment to the Ohio Board of Tax

Appeals. NCR's notice of appeal stated that since the machines were manufactured solely for export, the assessment was "* * * in violation of Article I, § 10, Clause 2, of the Consttiution of the United States." (A. 49).

The Ohio Board of Tax Appeals affirmed the assessment of tax. It based its decision on all of the federal and most of the state decisions bearing upon the Import-Export Clause, nearly one hundred years of precedent, prescribing two criteria which must exist concurrently for personal property to be exempt from state taxation as an export:

"(1) the property must have started on its journey to a foreign destination

"(2) the property must be irrevocably committed to export." (A. 126).

Further, the Ohio Board of Tax Appeals found that while there appeared to be many variables pertaining to *when* the movement contemplated in number (1) above begins, nowhere was it said that the second test alone, as advocated by NCR, was sufficient. (A. 127). NCR appealed that decision to the Supreme Court of Ohio. Again, the same issue of constitutional immunity from state taxation was raised. The Supreme Court of Ohio reversed the decision of the Ohio Board of Tax Appeals, permitting the "certainty of export" test alone to prevail.

The Ohio Court based its decision on facts in the record that showed that no machine manufactured by NCR for the international division was diverted, or able to be diverted, to the domestic market (A. 89, 100). Due to the special construction of the machines for foreign customers, the machines could not *economically* be converted for domestic use and sale. Against NCR's profit margin of approximately five percent per unit, the

conversion cost would be approximately sixteen percent (A. 82, 83).

Any such attempted conversion would involve, of necessity, complex technical variations in electrical current used by the machines and the electric systems of the machines. (A. 86, 87). In the case of cash registers, the indicator, registration and cash drawer were unique to the foreign country where the machine would be used. (A. 77-88, 95).

The Supreme Court of Ohio relegated the necessity that the journey to a foreign destination be commenced to situations involving fungible goods. NCR's "* * * cash registers, accounting machines, and electronic data processing systems which have been ordered, designed and built exclusively to serve the peculiar needs of specific foreign consumers" were found immune from state taxation under Article I, Section 10, Clause 2 of the United States Constitution. (A. 133, 134).

SUMMARY OF ARGUMENT

The sole issue in this case is when the exemption from state taxation provided in the Import-Export Clause of the United States Constitution attaches to goods manufactured and located in Ohio. As found in the leading export cases decided by the Supreme Court of the United States from 1886 to 1949, the answer is simply that personal property is not immune from state taxation unless it has started on its journey to a foreign destination.

The personal property of NCR, an Ohio taxpayer, was assessed by the Tax Commissioner of Ohio while it was merely stored in a warehouse awaiting shipment. It had not entered into the stream of export. NCR's ultimate intent to export the property is not enough to commence the process of export and change property awaiting shipment into an export.

The effect of the decision of the Ohio Court is an unwarranted and significant erosion of the decisions of the United States Supreme Court that define "export." Moreover, it allows the Ohio taxpayer to be relieved of its proper share of state taxes upon its inventory awaiting shipment. The revenue raised by the state tax is used to provide local services that benefit the taxpayer.

ARGUMENT

PERSONAL PROPERTY IS NOT IMMUNE FROM STATE TAXATION UNLESS IT HAS STARTED ON ITS JOURNEY TO A FOREIGN DESTINATION.

The controversy embraced in the legal issue presented by this case antedates the founding of the federal government.[2] It involves the question of a state's power to tax against the freedom of exports from state taxation. It finds expression in the Import-Export Clause of the United States Constitution, which provides in part that

> "No State shall, without the Consent of Congress, lay any Imposts or Duties on Imports or Exports * * *."

The interpretations and application of this constitutional concept are found in nearly one hundred years of United States Supreme Court precedent stemming from *Coe* v. *Errol*, 116 U.S. 517 (1886). They are simply that personal property is not immune from state taxation unless it has started on its journey to a foreign destination. Decisions to that effect are many and controlling and show the historical development of the test of "what is an export."

In *Coe* v. *Errol*, 116 U.S. 517 (1886), spruce logs were cut in New Hampshire and placed in a stream to be

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[2] See Madison, *Debates in the Federal Convention of 1787*, 538-541, 573-577, 622-623, 717-718 (Scott ed.; 1839).

floated down the Androscoggin River to the State of Maine to be manufactured and sold. The logs were detained in the Town of Errol, New Hampshire, by low water and were taxed by the selectmen of Errol in the year 1881. Mr. Justice Bradley said that the "precise question for solution" was:

> "Do the owner's state of mind in relation to the goods, that is, his intent to export them, and his partial preparation to do so, exempt them from taxation?" (116 U.S. 525.)

The answer was no, because the spruce logs had not entered the stream of export. The Court stated:

> "* * * nor is exportation begun until they are committed to the common carrier for transportation out of the State to the State of their destination, or have started on their ultimate passage to that State. Until then it is reasonable to regard them as not only within the State of their origin, but as a part of the general mass of property of that State, subject to its jurisdiction, and liable to taxation there, if not taxed by reason of their being intended for exportation, but taxed without any discrimination, in the usual way and manner in which such property is taxed in the State. (116 U.S. 525.)

In a rhetorical question, the Court asked "* * * until actually put in motion, for some place out of the State, or committed to the custody of a carrier for transportation to such place, why may they not be regarded as still remaining a part of the general mass of property in the State?" (116 U.S. 526.) There was no answer, for the Court decided that the logs were precisely the kind of property subject to state taxation.

Turpin v. *Burgess*, 117 U.S. 504 (1886), found that an excise tax on tobacco, *before* its removal from the fac-

tory, was not a duty on exports within the constitutional prohibition, even though the tobacco was intended for later export. Mr. Justice Bradley again asked how a state tax on property still resting in the state could be improper:

> "But a general tax, laid on all property alike, and not levied on goods in course of exportation, nor because of their intended exportation, is not within the constitutional prohibition. How can the officers of the United States, or of the State, know that goods apparently part of the general mass, and not in course of exportation, will ever be exported? Will the mere word of the owner that they are intended for exportation make them exports? This cannot for a moment be contended. It would not be true, and would lead to the greatest frauds." (117 U.S. 507.)

Cornell v. *Coyne*, 192 U.S. 418 (1904), involved a federal stamp tax on "filled cheese." The taxpayers were manufacturers who entered into contracts for the manufacture and export of cheese. They were required to affix stamps to the exported packages. An immunity from taxation was claimed under Article I, Section 9, Clause 5 of the United States Constitution which reads: "No tax or duty shall be laid on articles exported from any State." In subjecting the manufactured cheese to taxation, the Court decided:

> "The true construction of the constitutional provision is that no burden by way of tax or duty can be cast upon the exportation of articles, and *does not mean that articles exported are relieved from the prior ordinary burdens of taxation which rest upon all property similarly situated. The exemption attaches to the export and not to the article before its exportation.* * * *"
>
> (192 U.S. 427; emphasis added.)

The next case, *A. G. Spalding & Bros.* v. *Edwards*, 262 U.S. 66 (1923), involved a federal tax on baseballs and bats sold by the manufacturer. A Venezuelan firm ordered a New York commission house to buy a quantity of bats and balls for their account. The New York commission house placed the order with Spalding and instructed it to deliver the goods to an exporting carrier in New York for shipment to Venezuela. The goods were delivered to the carrier and an export bill of lading was issued. Tax was levied on the sales of baseballs and bats.

Mr. Justice Holmes stated the issue: "[w]hether the sale was a step in exportation * * *". (262 U.S. 68.) He concluded that exportation had begun:

> "The very act that passed the title and that would have incurred the tax had the transaction been domestic, committed the goods to the carrier that was to take them across the sea, for the purpose of export and with the direction to the foreign port upon the goods. The expected and accomplished effect of the act was to start them for that port. "* * * * * * * * *"
>
> (262 U.S. 68.)

The *Spalding* case also is important because it echoes a problem consistently encountered in cases decided under the Import-Export Clause. The problem is where to draw the line beyond which manufactured goods are immune from state taxation. Just as the Supreme Court has been called upon to determine when imports are no longer to be treated as imports, so the Court has been faced with drawing the line as to when goods destined for export have not yet taken on the cloak of immunity as an export. In terms of imports, Chief Justice Marshall stated both the problem and the solution in *Brown* v. *Maryland*, 12 Wheat. 419, 441-442 (1827), "[t]here must be a point of time when the pro-

hibition ceases, and the power of the State to tax commences; * * *."[3] In terms of exports, there must also be a point in time when the power of the state to tax ceases and the constitutional immunity from taxation begins. Mr. Justice Holmes recognized this in *Spalding* when he said:

> "So we return to the question that we have stated. [When does export begin?] To answer it with regard to any transaction we have to fix a point at which, in view of the purpose of the Constitution, the export must be said to begin. *As elsewhere in the law there will be other points very near to it on the other side, so that if the necessity of fixing one definitely is not remembered any determination may seem arbitrary.*" (262 U.S. 69; emphasis added)

That point that commences exportation, as drawn by the Court, is at the time when goods begin actual movement into the stream of export. That point was never reached by NCR's goods in Ohio. They remained in the Dayton warehouse in inventory on tax listing date (A. 88, 89). Ohio's power to tax did not cease as of December 31, 1967.

The requirement that goods must begin their journey before they are exports was reiterated in *Richfield Oil Corp.* v. *State Board of Equalization*, 329 U.S. 69 (1946). The taxpayer there was a California refiner and seller of oil that entered into a contract with the government of New Zealand to deliver oil "f.o.b." Los Angeles. The oil was transported from taxpayer's refinery to the harbor where it was placed in the taxpayer's storage tanks When a New Zealand ship arrived, the taxpayer pumped the oil from its storage tanks into the hold of the ship. At the same time, the taxpayer received a bill

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[3] See *Youngstown Sheet & Tube Co.* v. *Bowers*, 358 U. S. 534, 558-559 (1959).

of lading indicating it was the shipper. The tax authorities levied a tax upon the gross receipts paid to the taxpayer. The Supreme Court of California held that since delivery of the oil marked passage of title, which was the time the tax attached, the transaction was not exempt since export had not begun. The California Supreme Court suggested that if the oil had been placed upon a common carrier rather than on the purchaser's ship, a different result might have occurred (329 U.S. 74).

On appeal to the United States Supreme Court, California relied upon *A. G. Spalding Co., supra*, as supporting its proposition that delivery to a common carrier marked the start of the export process. In rejecting this contention, the Supreme Court of the United States commented:

> "The certainty that the goods are headed to sea and that the process of exportation has started * * * may normally be best evidenced by the fact that they have been delivered to a common carrier for that purpose. But the same degree of certainty may exist though no common carrier is involved. The present case is an excellent illustration. The foreign purchaser furnished the ship to carry the oil abroad. Delivery was made into the hold of the vessel from the vendor's tanks located at the dock. *That delivery marked the commencement of the movement of the oil abroad.* It is true, as the Supreme Court of California observed, that at the time of the delivery the vessel was in California waters and was not bound for its destination until it started to move from the port. But when the oil was pumped into the hold of the vessel, it passed into the control of a foreign purchaser and there was nothing equivocal in the transaction which created even a probability that the oil would be diverted to domestic use. *It would not be clearer that the oil had started upon its export journey had it been delivered to a common*

> *carrier at an inland point.* The means of shipment are unimportant so long as the certainty of the foreign destination is plain." (329 U.S. 82-83; emphasis added.)

The first two sentences of this holding cannot be seized upon to argue that mere certainty of foreign destination is the sole criteria which qualifies property *intended* for foreign destinations as exports. The entire holding shows that the Court found that the export journey had begun: "That delivery marked the commencement of the journey of the oil abroad." The question was whether a different result should obtain since the oil had been delivered to the purchaser's ship rather than a commercial carrier. The Court did not disregard the requirement of delivery as a criteria for an export, but rather found that the oil entered the export stream upon delivery to the purchaser's ship.

In 1949, the Supreme Court decided two export cases. In *Joy Oil Co.* v. *State Tax Commission,* 337 U.S. 286 (1949), a Canadian corporation bought gasoline in the United States for export to Canada. The gasoline was shipped by rail to Detroit and was stored in tanks for fifteen months before it was shipped to Canada. A municipal ad valorem tax was assessed on the gasoline.

The Supreme Court found the gasoline not immune from taxation. Mr. Justice Franfurter explained:

> "The circumstances which tended, at the time when the tax was assessed, to establish petitioner's intent to export the gasoline and the fact that the gasoline was eventually exported are not enough, by themselves, to confer immunity from local taxation. * * *
>
> "* * * * * * * * *
>
> "The Export-Import Clause was meant to confer immunity from local taxation upon property

> being exported, not to relieve property eventually to be exported from its share of the cost of local services * * *." (337 U.S. 288, 289.)

Finally, *Empresa Siderurgica* v. *County of Merced*, 337 U.S. 154 (1949), restated the necessity that the journey of exportation must have begun.[4] A cement plant in Merced County, California, was sold to a South American corporation for export. An export license was issued, title passed, and a common carrier was hired to dismantle and package the plant for shipment. The County of Merced levied a personal property tax on the parts of the plant that had not been shipped out of the country.

The Supreme Court upheld the tax levy, stating:

> " . . . it is not enough that there is an intent to export, or a plan which contemplates exportation, or an integrated series of events which will end with it * * *. *It is the entrance of the articles into the export stream that marks the start of the process of exportation. Then there is certainty that the goods are headed for their foreign destination and will not be diverted to domestic use. Nothing less will suffice.*" (337 U.S. 156-157; emphasis added).

The *Empresa* case is also significant because it belies the belief of the Ohio Court that *all* the Supreme Court cases defining exports "* * * embraced products which were completely fungible or were viewed as such." (A. 133). In *Empresa*, the property tax was levied on the various parts of a cement plant that were (1) crated and ready for shipment; (2) dismantled but not yet packed; and (3) not yet dismantled. The various parts of the plant were not fungible goods nor can they be viewed as such. The Supreme Court has never based its definition of "exports" upon a determination of whether the goods to be exported were fungible or nonfungible goods.

[4] For a discussion of this case, see Note, 22 S. Cal. L. Rev. 184 (1949).

The dissenting opinion of the Ohio Court recognized this mistaken interpretation of the case law and countered it by saying:

> "Such a fungible-goods argument may have some validity once the process of exportation has started and the exemption attaches to the goods. Then and only then, under the cases, does the question arise as to the certainty of the goods completing the process and reaching the foreign destination as against the possibility of being diverted to the domestic market. See, *e.g., Joy Oil Co., supra; Empresa Siderurgica, supra.* However, the fungible-goods argument is not relevant to the question presented in the instant case."
>
> *National Cash Register Co.* v. *Kosydar,* 35 Ohio St. 2d 166, 173, 174, 298 N.E. 2d 559, 564 (1973) (O'Neill, C. J. dissenting). (A. 137).

Thus, the Supreme Court has extended the protection of the Import-Export Clause *only* to those goods which have actually begun movement into the export stream. In *Coe* v. *Errol,* the spruce logs had not started upon their ultimate passage to another state. In *A. G. Spalding,* delivery of packages to an exporting carrier for shipment granted immunity from state taxation. In *Richfield Oil Corp.,* the state retail sales tax was void because the oil had been delivered into the hold of the vessel which took it to New Zealand. In *Joy Oil,* the fact that the gasoline was eventually to be exported did not render it immune when it was stored for fifteen months. And in *Empresa Siderurgica,* the parts of the cement plant not committed to movement out of the country on tax lien date were not exports.

In NCR's case, its goods were warehoused in Dayton Ohio. They had not begun their journey. They had not been delivered to a carrier when Ohio personal property tax was assessed by the Tax Commissioner. The goods

were not in the export stream and were properly subject to Ohio taxation. This was the decision of the Ohio Board of Tax Appeals, which rested solely on its interpretation of the Import-Export Clause, but which was reversed by the Supreme Court of Ohio.

The Ohio Court's decision must also be viewed in its relation to the decisions of other state courts. The Ohio decision is, with one exception, the *only* state decision to ignore the requirement that goods must have entered the stream of export before they gained immunity from state taxation.

The most consistent state decision-making on the export issue is found in California cases. With one exception, all adhere to the rule that if property has not on tax day entered the export stream, even though destined for export, it is subject to state taxation.

The taxpayer in *Gough Industries, Inc.*, v. *State Board of Equalization*, 51 C. 2d 746, 331 P. 2d 161 (1959), was a California manufacturer of electrical supplies who sold goods in California to a purchaser for export to Saudi Arabia.[5] Because the manufacturer could not meet the specific foreign packaging requirements, the goods were shipped first by truck to a packer. Title passed at the time the goods were delivered to the packer. The California Supreme Court determined that a state sales tax assessment was invalid under the Import-Export Clause of the Constitution because "* * * the movement of the goods had started on a continuous journey in foreign commerce from Los Angeles to Saudi Arabia when the tax was imposed." (51 C. 2d 750).

The taxpayer in *Union Oil Co. of California* v. *City of Los Angeles*, 38 Cal. Rptr. 923 (1964), did not include in its gross receipts for city license tax purposes the receipts from sales of petroleum products to the United States

[5] For a discussion of this case, see Note, 1 B. C. Ind. & Com. L. Rev. 104 (1959).

government. All such products were either pumped aboard a merchant ship or delivered to a port of embarkation for transhipment either by merchant ships or government ships. All petroleum products were transported and consumed thereafter outside the United States. The Court of Appeal found that the city tax was improperly imposed on exports.

The Supreme Court of California found that sales of "bunker fuel oil" for consumption by both foreign and domestic ships going to foreign ports were not immune from state sales tax as exports in *Shell Oil Company* v. *State Board of Equalization,* 51 Cal. Rptr. 524, 414 P. 2d 820 (1966). The Court worried about an extension of the concept of "export" requiring the "* * * invalidating of a tax on any product, process or service somehow related to and necessary for exportation. The acceptance of such a contention would 'lead back to every forest, mine, and factory in the land and create a zone of tax immunity never before imagined.' [citation omitted]" (414 P. 2d 825).

Two cases involving the same parties are the next relevant California decisions. In *Hugo Neu Corp.* v. *County of Los Angeles,* 241 Cal. App. 2. 703, 50 Cal. Rptr. 916 (1966), property taxes were levied on iron and steel scrap physically located at taxpayer's California plant but held for shipment to Japanese customers. Certain of the scrap was held for potential obligation to Japanese buyers and the remaining scrap was actually committed to one buyer, the Gosho Company. The taxpayer contended that the scrap had entered the export stream and was immune from state taxation.

The Court of Appeal held:

> "* * * the twofold test for immunity from taxes was not satisfied. The movement from the original purchase to the depot in Los Angeles was merely preparatory and not pursuant to any definite or

assured plan to export. There was lacking the certainty that the goods were headed for a foreign destination. At the time of the original movement of the scrap, the original Japanese buyers had not validly contracted for the prepared scrap, and, as of that date, it was possible that those buyers would never order it.

"* * * * * * * * *

"As for the scrap contracted for by The Gosho Company, although a contract with The Gosho Company did exist prior to the taxing date, there was no movement or other acts, *after* the formation of that contract, or referable to it, such that immunity could have been conferred on that particular portion of the prepared scrap. * * *."

(241 Cal. App. 2d 709).

In *Hugo Neu Corp.* v. *County of Los Angeles*, 7 Cal. App. 3d 21, 86 Cal. Rptr. 332 (1970), the same basic facts existed. Property taxes were assessed upon steel scrap located at taxpayer's plant awaiting shipment to Japan. As in the instant case with NCR's cash registers and other goods, the scrap was not produced for domestic sales or use. Once again, the Court of Appeal found that "[b]oth certainty and motion—or commitment thereto—are necessary to a finding that goods are exports; further, they must exist concurrently." (7 Cal. App. 3d 24).

The Court noted that "the real trouble" with taxpayer's argument was that on tax lien date, the scrap had not started on a transportation to Japan in a continuous route or journey. "It rested at the very same plant where plaintiffs had acquired it." (7 Cal. App. 3d 25). The same trouble plagues NCR in this case. The cash registers and other equipment rested at Dayton where they were manufactured (A. 88, 89). They had not begun their journey and were not exports when property tax was levied.

The only aberrant California decision is *Montrose Chemical Corp.* v. *County of Los Angeles*, 243 Cal. App.

2d 300, 52 Cal. Rptr. 209 (1966). County taxes were levied upon packaged "D.D.T. Concentrate" located at taxpayer's plant on tax lien date. The D.D.T. had not been delivered to a dock or warehouse; had not been delivered to a common carrier; and had not, in any way, begun physical movement out of the country. The Court of Appeal held that the goods were immune from taxation because "* * * it was certain that the D.D.T. Concentrate, which could not be sold in the United States and which had been especially packaged for overseas shipment to a particular purchaser, was committed to a foreign destination and could not be diverted to domestic use." (243 Cal. App. 2d 304). Attention to prior and subsequent decisions shows, however, that *Montrose* is not the prevailing rule in California export decisions. Moreover, one California court recognized that the decision in *Montrose* cannot be reconciled with the prevailing United States Supreme Court decisions or with the California cases. *Rice Grower's Association of California* v. *County of Yolo,* 17 Cal. App. 3d 227, 94 Cal. Rptr. 847, 850 (1971).

In the *Rice Grower's* case, the taxpayer operated a rice mill which processed rice for export to Puerto Rico, Okinawa, and Japan. As in the instant case, the rice could not be marketed domestically without remilling which was economically unfeasible. Tax was levied on rice stored variously at taxpayer's warehouse and at ports awaiting ocean transportation. The Court concluded that all rice was properly taxed because it did not become an export until "* * * it was loaded into the ship carrying it to the foreign county." (94 Cal. Rptr. 852).

The Court of Appeal summarized most of the cases in the export area and formulated eleven propositions of law. The first two are directly contrary to the Ohio Court's contention that "certainty of export" is the proper test:

"(1) The intention to export is not enough." [Citations omitted]

"(2) Manufacturing goods or processing to fill an export order, even to consignee's specifications, does not constitute the goods an export, before the final uninterrupted journey commences." [Citations omitted] (94 Cal. Rptr. 853).

The last California case is *Cargill of California, Inc.* v. *County of Yolo*, 26 Cal. App. 3d 704, 103 Cal. Rptr. 257 (1972). The Court of Appeal decided that a personal property tax levied on alfalfa pellets stored at a port facility was improper under the Import-Export Clause. The court found that the movement of pellets from the taxpayer's production facility to the shipping port was the beginning of a continuous foreign journey. This fact, along with the certainty of foreign export and the reasonableness of the interruption of the journey by storage at the port, rendered the goods immune from state taxation.[6]

Just as important as precedent in this case is whether the State of Ohio has given anything to NCR for which it can ask return. The General Assembly of Ohio, a co-equal partner in the government of the state, enacted §5709.01 of the Revised Code of Ohio, which provides that "* * * All personal property located and used in business in this state * * * [is] subject to taxation * * *." (Appendix A, *infra*, at 25). §5711.13 directs the Tax Commissioner of Ohio to "* * * assess the personal property of such corporation in the several taxing districts in which it is required * * *." (Appendix B, *infra*, at 26).

---

[6] Other state decisions dealing with state taxation under the strictures of the Import-Export Clause include *Multnomah County* v. *Dant & Russell, Inc.*, 75 P. 2d 986 (1938); *Alaska S. S. Co.* v. *State of Washington*, 196 P. 2d 1001 (1948); *Eardley Fisheries Co., Inc.*, v. *City of Seattle*, 314 P. 2d 393 (1957); *Myers* v. *Commissioners of Baltimore County*, 35 A. 144 (1896).

Taxation of tangible personal property is an important part of Ohio's plan of taxation.

> "An outstanding feature of the Ohio State-local tax structure is its degree of dependence on revenue from tangible personal property. In 1966, this component of the property tax produced $289 million, all of which went to local governments. This amount was more than one-fifth of all taxes levied on real estate, public utilities, and tangible personal property. No other state approaches Ohio in the amount of revenue obtained from this source."
>
> (*Ohio Tax Study Commission Report*, Chapter IV, 1965-1967).

As noted in the dissenting opinion of O'Neill, C. J., below (A. 135; 35 Ohio St. 2d 166, 172), the revenue raised by the tax imposed is used in accordance with Ohio law to pay for the local services of government by counties, municipalities, townships, and health districts, including the operation of schools.[7] This provides benefits for all the citizens of Ohio, both private and corporate, in the respective local communities.

While NCR would understandably like to be relieved of its share of these state taxes, the only basis upon which it can claim such relief is by a new interpretation of the Import-Export Clause of the United States Constitution. As heretofore noted, that clause has been construed by the United States Supreme Court to grant immunity from state taxation *only* in those cases where the journey of exportation had begun. Unless that interpretation is modified by the Supreme Court of the United States, it must stand as the limit of taxation as much for the State in terms of what it may validly collect and distribute as for its citizens in terms of what must be paid. The Su-

[7] Chapter 5705, the tax levy provisions of the Revised Code of Ohio, directs the distribution of tax revenue. See §5705.05.

preme Court of Ohio may no more restrict what the State of Ohio may collect under the federal Import-Export Clause than it may expand an Ohio citizen's tax liability beyond the limits therein described. Yet in the Ohio Supreme Court opinion dated July 11, 1973, the carefully and consistently developed definition of "export" was swept away.

The inconsistency of the Ohio Court's decision with the constitutional interpretation and policy of the Import-Export Clause can be best illustrated by example:

> "The plant facilities of manufacturers A and B are contiguous. Both manufacture similar products. A manufactures exclusively for domestic consumption, while B produces solely for the foreign market. Both have in their warehouses inventories worth fifty thousand dollars. An ad valorem property tax is levied against both A and B on the lien date. B pays under protest and seeks a refund of the tax because the taxed goods had been manufactured pursuant to a contract with a European based company, had been crated for overseas shipment, and were manufactured pursuant to foreign specifications. The producer, B, was simply awaiting shipping instructions before delivering the goods to a common carrier. The court finds that the foreign destination of the goods is sufficiently clear and orders a refund.
> * * *
>
> "However, it is clear that manufacturers A and B have benefited equally from state protection and facilities. This broad exemption for exports places a disproportionate share of the tax burden upon A, the taxpayer who manufactures for domestic consumption."
>
> (Note, *Import-Export Clause: A Blanket Prohibition Misapplied,* 40 S. Cal. L. Rev. 528 (1967)).

It is also clear in this case that NCR's goods have benefited equally with other Ohio manufacturers' goods from state protection. This is especially true for those NCR products that remained in Ohio for as long as three years. (A. 89).

NCR will ask this Court, as it did the Ohio Court, to weaken the rule regarding the precise point where the process of exportation begins by carving a new immunity for those goods manufactured solely for export and "certain to be exported." However, the rule regarding exports, valid for almost a hundred years, should not be changed, as the Ohio Court sought to do. The effect of recognizing an earlier point as the beginning of the process of exportation would result in a new and unwarranted curtailment of state taxing power. This curtailment would conflict with the recognition by the Supreme Court of the importance of meeting state revenue needs. *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U.S. 450, 452 (1959).[8] The need for state revenue is most valid when, as here, the state has given state protection and benefit to a taxpayer from whom it asks payment in return.

Finally, the new definition of export created by the Ohio Court may well be productive of greater state litigation, not only in Ohio but in every state. The test of "what is an export" advocated below is a subjective one. That is, are the goods *intended* to be exported? The present test of entrance into the stream of export is definite and objective. It has the virtue of being a practical test for state tax administration. It can be administered

[8] See also *Rice Grower's Association of California* v. *County of Yolo*, 17 Cal. App. 3d 847, 850 (1971), *American Smelting & Refining Co.* v. *County of Contra Costa*, 77 Cal. Rptr. 570, 585 (1969); and *Pan American World Airways, Inc.* v. *Government of the Virgin Islands*, 459 F.2d 387, 394 (1972).

firmly, fairly, and consistently, not only be the Tax Commissioner of Ohio, but by all state tax administrators. It is also easily recognizable by all taxpayers who have the obligation to pay state taxes.

After almost one hundred years of precedent, the Supreme Court should reaffirm that personal property is not immune from state taxation unless it has started on its journey to a foreign destination.

CONCLUSION

For the reasons stated, the judgment of the Supreme Court of Ohio should be reversed.

Respectfully submitted,

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January 1974

APPENDIX A

5709.01 Taxable property entered on general tax list and duplicate.

All real property in this sate is subject to taxation, except only such as is expressly exempted therefrom. All personal property located and used in business in this state, and all domestic animals kept in this state and not used in agriculture, except unmanufactured tobacco, which shall be exempt from taxation for state purposes to the extent of the value, or amounts, of any unpaid nonrecourse loan or loans thereon granted by the United State government or any agency thereof, are subject to taxation, regardless of the residence of the owners thereof. All ships, vessels, and boats, and all shares and interests therein, defined in section 5701.03 of the Revised Code as personal property and belonging to persons residing in this state, and aircraft belonging to persons residing in this state and not used in business wholly in another state, other than aircraft licensed in accordance with sections 4561.17 to 4561.21, inclusive, of the Revised Code, are subject to taxation. All property mentioned as taxable in this section shall be entered on the general tax list and duplicate of taxable property. (132 v H 480. Eff. 12-2-67. 126 v 166)

APPENDIX B

5711.13 Corporation shall make combined return; assessment; certification to auditor of state.

A corporation having taxable property required to be listed in more than one county shall make a combined return to the tax commissioner listing all its taxable property in this state, in conformity with sections 5711.01 to 5711.36, inclusive, of the Revised Code, but it shall not assign its property of the kinds mentioned in section 5709.02 of the Revised Code to any particular taxing district or county. The commissioner shall assess the personal property of such corporation in the several taxing districts in which it is required by sections 5711.01 to 5711.36, inclusive, of the Revised Code, to be assessed, and shall issue assessment certificates therefor to the proper county auditors at the time and in the manner required by section 5711.25 of the Revised Code. All other property of such corporation required to be so listed shall be entered on the intangible property tax list in the office of the auditor of state and the duplicate thereof in the office of the treasurer of state and taxed under section 5707.03 of the Revised Code. The commissioner shall assess all other property of each corporation, and, on or before the third Monday of May, annually, shall certify the total value or amount of each kind thereof to the auditor of state, who shall enter same on the intangible property tax list in his office in the manner provided in sections 5725.01 to 5725.26, inclusive, of the Revised Code. Sections 5711.01 to 5711.36, inclusive, of the Revised Code, shall apply to and govern such corporation, its proper officers and representatives, the commissioner, and the county auditor as to all proceedings in the assessment of the property of such corporation. (129 v 582. Eff. 1-10-61)

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IN THE

Supreme Court of the United States

No. 73-629

OCTOBER TERM, 1973

ROBERT J. KOSYDAR,
TAX COMMISSIONER OF OHIO,
Petitioner,

v.

NATIONAL CASH REGISTER COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF OHIO

BRIEF FOR THE RESPONDENT

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INDEX

	Page
QUESTION PRESENTED	1
STATEMENT OF THE CASE	2
(A) A Summary of Proceedings Below	2
(B) The Facts	2
(C) The Ohio Personal Property Tax	4
(1) The Nature of the Tax	4
(2) How the Tax is Determined	5
(3) Computation of the Tax Assessed NCR	5
(D) The Decision of the Ohio Supreme Court	5
SUMMARY OF ARGUMENT	6
ARGUMENT	9
I. The Constitutional Concern With Immunity Of Exports From Taxation	9
II. Prior Decisions Of This Court Hold That Export Immunity Prevents State Taxation Of Goods At That Point In Time When (1) The Goods Have Been Segregated From the Mass Of General Property Within The State, And (2) The Certainty Of Their Exportation Is Assured For All Practical Purposes	14

III. The Machines Of NCR Are Immune From Ohio's Ad Valorem Personal Property Tax, As Exports, Because They Have Been Custom Manufactured For Foreign Purchasers, Segregated From The Mass Of General Property Within The State By Special Export Packaging And Warehouse Storage, And Their Certainty Of Exportation Is Proved By The Fact That The Machines Are So Unique Due To Their Physical Characteristics, That They Cannot Be Used Domestically Or Economically Converted For Domestic Use 29

(A) The NCR Machines Were Segregated From the General Mass of Property in the State 30

(B) The Certainty of Exportation is Proved by the Character of the Machines and by the Other Facts Surrounding Their Origin and Disposition 31

IV. Reply To The Brief For The State Of Ohio 34

(A) Ohio's Argument That The NCR Machines Must be in Motion Toward Their Physical Destinations is Erroneous. It Confuses a Test For Determining Export Immunity With the Immunity Itself 34

(B) Ohio's Argument of *Quid Pro Quo* Does Not Bear Analysis 38

CONCLUSION 44

APPENDICES 45

CITATIONS

Cases:

A. G. Spalding Bros. v. Edwards, 262 U. S. 66 (1923) 23, 24, 25, 27, 31, 35

Brown v. Houston, 114 U. S. 622 (1885) 18, 30

Brown v. Maryland, 12 Wheat. 419, (25 U. S.) (1827) 11, 15, 16, 18, 19, 29

Carson Petroleum Co. v. Vial, 279 U. S. 95 (1929) 32, 37

Coe v. Errol, 116 U. S. 517 (1886) 19, 20, 21, 22, 30, 35

Cornell v. Coyne, 192 U. S. 418 (1904) 22

Empresa Siderurgica v. County of Merced, 337 U. S. 154 (1949) 26, 28, 30, 31

Fairbanks v. United States, 181 U.S. 292 (1901) 40

Hooven & Allison Co. v. Evatt, 324 U. S. 652 (1945) 17, 32

Joy Oil Company v. State Tax Commission, 337 U. S. 286 (1949) 28, 29, 30, 31, 35, 37

Montrose Chemical Corp. v. County of Los Angeles, 243 Cal. App. 2d 300, *cert. den.* 404 U. S. 941 27

National Cash Register Co. v. Kosydar, 35 Ohio St. 2d 166 (1973) 2

Northwestern States Portland Cement Co. v. Minnesota, 358 U. S. 450 (1959) 40

Peck & Company v. Lowe, 247 U. S. 165 (1918) 42

Richfield Oil Corp. v. State Board of Equalization, 329 U. S. 69 (1946) ..12, 25, 26, 27, 31, 32, 35, 40

Turpin v. Burgess, 117 U. S. 504 (1886) 22, 23

Youngstown Sheet & Tube Co. v. Bowers, 358 U. S. 534 (1959) 13, 16

Constitutions and Statutes

United States Constitution:

Art. I. §9, Cl. 5 .....6, 10

Art. I, §10, Cl. 2 .....2, 6, 10, 34

Revised Code of Ohio:

Section 5709.01 .....4, 45

Section 5711.16 .....4, 5, 46

Federal Statutes:

"Equal Export Opportunity Act", and "International Economic Policy Act of 1972", Public Law 92-412; 86 Stat. 644, 92 Cong. 2d Sess. (1972) (Extracts of legislative history attending enactment) 42, 48

Miscellaneous

Baldwin's Ohio Tax Laws & Rules, Third (1973), Ed., p. 51 5

Extracts From an Address by Deputy Kenneth Rush, U. S. Dept. of State (Oct. 11, 1973) ..42, 50

Law and Contemporary Problems, Vol. 37, p. 219 ... 13

Law and Policy in International Business, Vol. 5, No. 1 (1973) ... 13

Ohio Department of Taxation, "*Instructions and Explanations Relating to Corporation Return of Taxable Property* (1967) p. 3 ... 5

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Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF FOR THE RESPONDENT

QUESTION PRESENTED

Does Article I, Section 10, Clause 2, of the United States Constitution forbid Ohio from levying its ad valorem personal property tax on machines custom built for foreign shipment, when the machines, due to their unique physical characteristics, can only be used in foreign countries, cannot economically be converted for domestic use, and are specially packaged and stored in a warehouse awaiting certain and ultimate shipment abroad?

STATEMENT OF THE CASE

A Summary of Proceedings Below

The original proceedings in this case were brought by National Cash Register Company (NCR) to challenge an assessment by the State of Ohio of its ad valorem personal property tax. For the tax year 1968, Ohio levied this tax upon certain cash registers, accounting machines and data processing systems which NCR had manufactured pursuant to specific foreign orders and which were solely for sale and use in foreign countries. At the time of the tax levy, the machines were specially packaged for export transportation and were stored in the NCR warehouse awaiting certain and ultimate shipment abroad. NCR asserted its claim that these machines constituted exports within the meaning of Article I, Section 10, Clause 2, of the United States Constitution and were thus immune from the tax imposed by Ohio. On July 11, 1973, the Supreme Court of Ohio agreed with the contention of NCR and issued its opinion holding the machines to be export property immune from Ohio's tax. *National Cash Register Co. v. Kosydar* (1973), 35 Ohio St. 2d 166, 298 N.E. 2d 559. Rehearing was denied by the Supreme Court of Ohio on September 6, 1973. Ohio's appeal to the Supreme Court of the United States was dismissed for want of jurisdiction, however, certiorari was granted contemporaneously on December 17, 1973.

The Facts

The facts have never been disputed and they are adequately summarized in both the Brief for the Petitioner and the majority decision of the Supreme Court

of Ohio. It is, however, necessary for NCR to emphasize several of the more significant facts. The machines taxed by Ohio are machines which have been specially packaged for export shipment and which are stored in the NCR warehouse. They are highly sophisticated electronic data processing systems, accounting machines and cash registers. All have been custom manufactured pursuant to advance specific foreign orders and designed and built to meet the individual needs of foreign customers for use in foreign lands. (A. 59-67) The machines could not be constructed prior to receipt of customer orders which serve to detail the specifications for the machines and the functions they are to perform. (A. 85-97, 98) After production, all the machines have been specially packaged for export shipment and moved to the NCR warehouse. (A. 73, 98, 114, 117) Without any exception, all the machines taxed by Ohio were later sent to their foreign destinations and none has ever found its way back to the United States. (A. 89) Finally, due to their unique physical construction and special adaptation for foreign use, the machines have no application whatever in the domestic market.

The Supreme Court of Ohio found that "it was uncontroverted that due to unique construction and special adaptation for foreign use, machines marketed by the International Division [of NCR] were not merely noncompetitive in the United States market, but were not saleable there. The reasons for this include complex technical variations in keyboards, wiring, detentes and motors; and, specifically as to cash registers, variations in dispensers, the amount of characters on the keys and in the windows and in the decimal point placement. There was evidence that electrical current varied from country to country, even in parts of the same country,

in terms of standard voltage and cycles, and in some instances, as between AC and DC current. These was also testimony that the degree of merchandising control in the retailing field in the United States was technically superior to that of other countries by ten years, making machines produced for foreign customers obsolete in the domestic market." (See also A. 66-69, 74-81, 87-88.) The Ohio Court further found that "an NCR export product could not economically be converted for domestic sale. Against the company's profit margin of approximately five percent per unit, the changeover cost would be approximately 16 percent per unit, rendering the possibility of a changeover totally unfeasible." (See also A. 82-83.)

The Ohio Personal Property Tax

(1) The Nature Of The Tax

The Ohio tax involved is an *ad valorem* personal property tax. Under Ohio Revised Code Section 5709.01, all personal property located and used in business within the State is subject to the tax. With irrelevant exceptions, the tax is imposed upon all tangible personal property of a manufacturer including inventories. Under Section 5711.16, these inventories are to include all articles purchased by a manufacturer for the purpose of being used in manufacturing, and all articles which have at any time been manufactured or changed in any way by combining, rectifying, refining or adding thereto. The scope of this inventory definition includes basic materials, goods in process of manufacture and finished goods. The statutes referred to are set forth in Appendices A and B, *infra*, at pages 45 through 46.

(2) How The Tax Is Determined

The inventories of manufacturers like NCR, including raw materials, goods in process of manufacture and finished goods, are required to be listed for tax as of December 31 of each year computed by a monthly "average value" technique. Under Ohio Revised Code Section 5711.16, the averaging is ascertained by adding the inventory values held at the end of each month during the prior year, and dividing this total sum by 12. The result is the "average value" and 50% of that "average value" is listed for taxation in the current year.[1]

(3) Computation Of The Tax Assessed NCR

The only machines claimed by NCR as immune from Ohio's tax, as exports, were those machines built solely for export, packaged, warehoused and awaiting shipment as of the end of each calendar month during 1967. The monthly "average values" of these machines totaled $2,159,035 which, at 50 percent, produced a listed value of $1,079,520. The tax assessed by Ohio against these machines was at the tax rate of $46.20 per $1,000 of listed value. Consequently, the total tax assessed against NCR on the machines claimed to constitute "exports" amounted to $49,872.90. (A. 47)

(4) The Decision Of The Ohio Supreme Court

This case was decided favorably to NCR by a 5-2

---

[1] Computation of the manufactured value of goods in process, as well as finished goods, must include all material costs, direct labor costs, and factory burden. See Vol. 1, *Baldwin's Ohio Tax Law & Rules*, Third (1973) Ed., p. 51, and *"Instructions and Explanations Relating to Corporation Return of Taxable Property"*, Ohio Department of Taxation (1967), p. 3.

decision of the Ohio Supreme Court. The Court held as follows:

> "This case * * * involved cash registers, accounting machines, and electronic data processing systems which have been ordered, designed and built exclusively to serve the peculiar needs of specific foreign customers. It is uncontradicted on the Record that, in every material respect, the machines involved herein are useless in the domestic market and never find their way there. Of all the cases examined, we were unable to find any situation where the 'certainty of export' has been more clearly demonstrated than in this case; the degree of certainty here exemplified is fully equivalent to that which attends the delivery of fungible goods to a carrier for the start of a journey to a foreign destination."

SUMMARY OF ARGUMENT

I. The constitutional concern with protecting from taxation that property which is to be exported from the United States to foreign countries is a pronounced one. The original Framers of our Constitution realized that vital national interests were intertwined with matters of foreign trade; national interests which transcended the need for either the federal government or the states to tax that foreign trade. To assure those dominant interests, the Framers entirely prohibited the federal government from taxing exports by Article I, Section 9, Clause 5. They likewise prohibited the states, without consent of Congress, from taxing export goods (and imports) except what was "absolutely necessary" for executing their inspection laws. Article I, Section 10, Clause 2. Today, the national interest in export

trade, and the freeing of it from state burdens, is no less than it was at the time of our constitutional genesis. Indeed, that interest is probably greater now than at any other time in our nation's history.

II. When a state seeks to impose a tax upon goods destined abroad, a point in time must be established for identifying when the constitutional immunity for exports precludes the state from levying its tax. In prior cases, this Court has held the export immunity to attach at that point in time when the goods claimed immune are shown to be (1) segregated and set apart from the mass of general property within the state, and (2) when the 'certainty of exportation' of the goods is demonstrated for all practical purposes.

The real problem in these prior cases has been to determine what state of facts must exist, at the time the tax is imposed, before the 'certainty of exportation' of the goods can be considered assured, for all practical purposes. These previous cases have involved goods and commodities like logs, baseball bats and balls, oil, and gasoline, all of which had a distinctive possibility of domestic as well as foreign use. Consequently, in measuring the 'certainty of exportation' for goods of this type, this Court has required the goods, as of the date of tax levy, to be either 'delivered to a common carrier', or 'delivered to the foreign purchaser's own vessel', or 'in actual physical movement toward the foreign destination'. With goods of this type, nothing else can suffice because, at any time before these events, the distinct possibility of diverting the goods to the domestic market is ever present. However, in no

prior case has this Court prescribed a sole and singular test for measuring the 'certainty of exportation' of goods. Instead, the totality of factual evidence in each case has been the most important consideration in assessing that certainty.

III. Export immunity is required for the NCR machines upon which Ohio levied its personal property tax. These machines were custom built in accordance with prior orders of foreign purchasers, and were specially made to serve the needs of those foreign purchasers. They are so unique, due to their physical and functional characteristics, that they cannot be used domestically or economically converted to domestic use. Moreover, the machines were specially crated, marked for export shipment and stored in the NCR warehouse awaiting ultimate and certain shipment abroad when the Ohio tax was imposed upon them. Because of these facts, both the segregation of the machines from the general mass of property within Ohio, and the certainty of their exportation, has been shown to exist beyond any reasonable doubt. All the facts, collectively, evidence a 'certainty of exportation', as of the time of Ohio's tax, fully equivalent if not superior to the certainty of exportation that might be proved by either 'delivery to a common carrier', or 'delivery to the foreign purchaser's own vessel', or 'physical movement toward the foreign destination'.

IV. (A) Ohio's argument that goods must be in 'physical motion' toward their foreign destination to be constitutionally immune from a state property tax is erroneous. Commencement of a physical

journey is only one indicia — not indispensible and not singular — of the 'certainty of exportation'. Because matters of substance, not form, control in assessing constitutional immunities, the collective facts attending the origin and disposition of the NCR machines prove their 'certainty of exportation' and their irrevocable commitment to the export process.

(B) Ohio's argument that tax must be paid because governmental services and benefits have been bestowed by the State is without merit. This '*quid pro quo*' concept affords no ascertainable standard for measuring tax immunity conferred by the Import-Export Clause which expressly prohibits state taxes of any kind upon exports, discriminatory or nondiscriminatory, unless approved by Congress.

Moreover, Ohio has already received property tax revenues from the machines in question by prior taxation of their individual parts and assemblies during the course of manufacture. It also has alternative taxing methods existing, or available to it, by which it may reimburse itself for the cost of government. Among these alternative taxes are corporate income and franchise taxes.

ARGUMENT

I. THE CONSTITUTIONAL CONCERN WITH IMMUNITY OF EXPORTS FROM TAXATION

The Framers of our Constitution did not want Government, through its tax levies, to impede the flow of do-

mestic goods abroad, nor, in their efforts to create an enduring federalism, did they want to chance the disunity that might result to the new republic by leaving all its sovereign parts free to tax export goods as they might individually choose to do. And so they took steps to assure that these things would not happen. First, they completely forbade the federal government from levying any tax whatever upon exports. This was accomplished by the prohibition of Article I, Section 9, Clause 5 of the Constitution providing that "No Tax or Duty shall be laid on Articles exported from any state." To further implement their purposes, the Framers then precluded each state, without the consent of Congress, from levying any tax upon exports except what might "be absolutely necessary for executing its inspection Laws." Again, so concerned were they with the prospect of offensive state taxes under the guise of financing inspection laws, that even this exception was qualified to assure that state levies of this type were (1) subject to control of the Congress and (2) that the *net produce* of any such state levies (apparently the excess over cost of inspection laws) was to be for the use of the Treasury of the United States. This latter prohibition, equally applicable to state taxes on "imports", was expressed in Article I, Section 10, Clause 2, in these few words:

> "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress."

Examination into the origins of these provisions will

show that they were the product of multiple compromise in an effort to reconcile diverse views and interests of the states. Notwithstanding the diversity of interests that then prevailed, the significant national interest in protecting export goods from unrestrained state taxation prodominated. Early in our constitutional existence, Mr. Chief Justice John Marsahll, in explaining 'why' the states were so expressly forbidden to levy their taxes on exports (and imports), put it in these words:

> "Plainly because, in the general opinion, the interests of all would be best promoted by placing the whole subject under the control of Congress." [2]

More than a century later (1946), this Court again reemphasized the significant national interest underlying the Import-Export Clause with specific reference to state taxes upon export goods. In rejecting a contention that the clause was designed to forbid only state taxes that "discriminated" against exports, the Court held as follows:

> "It is suggested * * * that the history of the Import-Export Clause shows that it was designed to prevent discriminatory taxes and not to preclude the levy of general taxes applicable alike to all goods. Support for that is found in the fact that this provision was defended in the Convention and later in

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[2] Motivating reasons for the tax immunity granted exports and imports were in part identified by Justice Marshall as "an apprehension that the power [to tax] might be so exercised as to disturb that equality among the states which was generally advantageous"; to preserve "that harmony between them which it was desirable to preserve"; and "to maintain unimpaired our commercial connections with foreign nations". *Brown v. Maryland*, 25 U. S. 419 (12 Wheat.) at 439. Perhaps the best summation of motivating reasons for the provision is found in the letter of Luther Martin (later Attorney General of the State of Maryland) to the Convention which finally ratified the Constitution. See Appendix C to this brief, p. 47.

the debates on the ground that it protected the inland States from levies by the coastal States through the taxation of exports. *Yet that function was only a phase of a larger design.* The Import-Export Clause was considered in connection with Article 1, §9, Clause 5, which provides that 'no tax or duty shall be laid on articles exported from any state'. The purpose was to withhold from Congress the power to tax exports, and to deprive any state of the power except with consent of Congress and even then, it seems, to require the net proceeds to be paid into the Federal Treasury. A proposal was made to prohibit the states 'from taxing the produce of other states exported from their harbours.' But that suggestion was not followed. The language adopted was supported by Madison 'as preventing all State imposts.' The qualified interpretation urged upon us has therefore no substantial support in the history of the Import-Export Clause."

Richfield Oil Corporation v. State Board of Equalization, 329 U. S. 69 at 76 and 77, with emphasis supplied.

Again, in 1959, Mr. Justice Frankfurter spoke to the predominant national values embodied within the Import-Export Clause by referring to the original reasons for it. Justice Frankfurter remarked:

"Primary among the forces which led to the inclusion of Art. 1, §10, cl 2, the Import-Export Clause, in the Constitution, was the deeply felt necessity of vesting exclusive power over foreign economic relations and foreign commerce in the new National Government. The importance of control over duties, imposts, and subsidies as an instrument of foreign trade and as a protection for the encouragement and growth of domestic manufactures was recognized as a matter of course by the Framers. For the effective exercise of this control it was necessary that the Government speak with one voice when regulating commercial intercourse with foreign nations.

> Orderly and effective policy would be impossible if thirteen States, each with their distinctive interests, and often conflicting, one with another, were allowed to exercise their own initiative in the regulation of foreign economic affairs. And so the States were prohibited from such regulation—they were forbidden, except by leave of Congress, to lay any duties on imports or on exports."
>
> *Youngstown Sheet & Tube Co. v. Bowers*, 358 U. S. 534 (dissent of Frankfurter and Harlan J. J. at 556)

Whatever the "subordinate" purposes might have been which gave rise to the constitutional immunities of exports from state taxes, the *predominant* purpose and the undeniable *general intention* of the Framers was to mark out a free path of outgoing commercial trade with foreign nations upon which no state could intrude with its levies. That early concern with national values intertwined with foreign export trade was not misplaced. Today, that concern must be intensified. Not only economic matters but national relations with powerful foreign countries now seem to hinge on advantageous exchange of goods and all that is bound up with it. Words and phrases signifying national power and national concerns express these current interests; words and phrases such as 'balance of trade', 'balance of payments', 'devaluation', 'detente', 'the Middle East', 'floating currency', to name but a few. Indeed, the national interest in export trade and the freeing of it from any state burdens, except what is absolutely necessary, may well be greater today than at any other time in our nation's history.[3]

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[3] For expositions of trade problems faced by United States business abroad, see *Law and Policy in International Business*, Vol. 5, No. 1, (1973), and *Law and Contemporary Problems*, Vol. 37, p. 219, et seq.

Recognition of these interests necessarily underlies the instant case because, in the broadest sense, the question involved is that of reconciling the national interest expressed in the constitutional immunity for export goods, like NCR's machines, and the asserted power of Ohio to levy its ad valorem property tax upon these same goods. In a narrower sense, but still expressive of these underlying competing interests, is the question of precisely *when* the constitutional export immunity attaches to goods manufactured solely for export and which have no realistic domestic use.

The argument that now follows will first be addressed to a discussion of the prior cases in which this Court has set forth two principal requirements that must be met in order for export immunity to attach, and the reasons why these requirements were formulated (BRIEF POINT II). Next, it will be shown how the NCR machines in controversy fulfill these two requirements for export immuity (BRIEF POINT III). Finally, it will be demonstrated why the arguments advanced in the brief for Ohio are without merit (BRIEF POINT IV).

II. PRIOR DECISIONS OF THIS COURT HOLD THAT EXPORT IMMUNITY PREVENTS STATE TAXATION OF GOODS AT THAT POINT IN TIME WHEN (1) THE GOODS HAVE BEEN SEGREGATED FROM THE MASS OF GENERAL PROPERTY WITHIN THE STATE, AND (2) THE CERTAINTY OF THEIR EXPORTATION IS ASSURED FOR ALL PRACTICAL PURPOSES.

In both the distant and recent past, this Court has been called upon to resolve cases concerning the point, or points, at which a state's power to tax both imported and exported property is forbidden by the Import-Export

Clause.[4] Although these cases are relatively few, the instant case is but another one of them. Its analysis, therefore, must derive from a due regard for the underlying principles and considerations upon which its predecessors were decided.

The dimensions of the general scope of constitutional immunity conferred by the Import-Export Clause were first drawn in *Brown v. Maryland*, 25 U. S. (12 Wheat.) 419, a case dealing exclusively with imported property taxed by a state under guise of a licensing law. Mr. Chief Justice Marshall, in speaking for the Court in 1827, both identified the general standard for determining import immunity and adopted the first test for measuring it. Marshall stated:

> "It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the state; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the Constitution."
>
> (25 U. S. (12 Wheat.) 419, at 56, 57)

Of further relevance, Marshall refused to accept the argument by Maryland that its license tax upon the persons selling the imported goods did not constitute a forbidden tax upon the imported goods themselves. Instead, Marshall emphasized that matters of *substance, not form*, would control in assessing the constitutional

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[4] Though differences may exist between the constitutional immunity granted imports and that granted exports, the scope of the immunity in both situations share a common foundation.

immunity. In specific response to the argument, Marshall stated:

> "[T]his is varying the form, without varying the substance. It is treating a prohibition which is general as if it were confined to a particular mode of doing things."
>
> (25 U. S. (12 Wheat.) 419, at 444)

The importance of *Brown v. Maryland* in the context of the case at bar is threefold. First, it established a *general approach* for distinguishing immune property from taxable domestic property; that is to say, the decision directed the first inquiry to be whether or not the property, at the time of a state's levy, has "become incorporated and mixed up with the mass of property in the country." It also fixed one rule for *measuring* whether the goods claimed immune have actually become mixed up with domestic property; that is to say, does the property taxed, at the time of the state's levy, remain in the "original form or package?" Finally, Marshall, with hedging foresight, declined to give a singular rule for measuring immunity in all cases by noting that it would be "premature to state any rule as being universal in its application."

In 1959, 132 years later, the essential holdings in *Brown v. Maryland* respecting imported goods were reapplied by this Court in factually different but basically similar situations. *Youngstown Sheet & Tube Company v. Bowers,* 358 U. S. 534. In *Youngstown,* steel and plywood manufacturers had respectively imported bulk iron ores and packaged wood veneers. At the time of the state/city tax levies, both the bulk ores and packaged veneers taxed remained in the same 'original form or package' as imported. However, in both instances, the

goods had arrived at their final destinations and parts were being indiscriminately used to supply daily operational requirements in manufacturing. The Court swept aside the taxpayers' contention that the goods were entitled to import immunity because they remained in their original form or package.[5] In formulating its opinion, the Court first observed that *Brown v. Maryland* taught, *inter alia,* that goods brought into this country by an importer for his own use, and used by him here, "are to be regarded as a part of a common mass of property and are not immune from taxation." Based on the collective facts presented in the cases, the Court then held that the goods in question had been *irrevocably committed* to use in domestic manufacturing and disregarded the asserted importance of the "original package" doctrine with this comment:

> "Breaking the original package is *only one of the ways* by which packaged goods that have been imported for use in manufacturing may lose their distinctive character as imports."
>
> — and —
>
> "The materials here in question were imported to supply, and were essential to supply, the manufacturer's current operating needs. When, after all phases of their importation had ended, they were put to that use and indiscriminate portions of the whole were actually being used to supply daily operating needs, *they stood in the same relation to the state as like piles of domestic materials at the same place* that were kept for use and used in the

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[5] The Court indicated its obligation to treat the claims of immunity in a "practical way" (358 U. S. 545) citing its prior decision in *Hooven & Allison Co. v. Evatt,* 324 U. S. 652. The latter case noted that in determining and applying the constitutional immunity, the "essential nature" of the transactions would control and not the formalities or technical procedures by which the goods were imported into the country.

same way. The one was then as fully subject to taxation as the other."

(358 U. S. at 548 and 549 with emphasis supplied)

The cases just reviewed were solely confined to determining the scope of exemption of *imported* property from state taxation. However, when the judicial analysis and implementation of the scope of *export* immunity from state taxation is examined, a striking similarity in basic principles is apparent. The dimensions of export immunity were first reviewed by this Court in *Brown v. Houston*, 114 U. S. 622 (1885). In that case, Louisiana had taxed ordinary coal held for sale at New Orleans by its owner's agents. After the tax was assessed, some of the coal was sold for export. The owners claimed export immunity, but the Court held that the coal, when taxed, was not entitled to immunity stating:

"When the petition was filed, the coal was lying in New Orleans, in the hands of Brown & Jones, for sale. * * * The complainants were not exporters; they did not hold the coal at New Orleans for exportation, but for sale there. Being in New Orleans, and held there on sale, without reference to the destination, or use which the purchasers might wish to make of it, it was taxed in the hands of the owners (or their agents) like all other property in the city, six mills on the dollar.

* * * *

"It [the coal] had become a part of *the general mass of property in the state*, and as such it was taxed for the current year (1880) as all other property in the City of New Orleans was taxed."

(114 U. S. 622, at 629 and 633 with emphasis supplied)

The importance of the *Brown v. Houston* decision here is minimal, except that it drew the early parameters of

the export immunity in the same basic terms as import immunity was drawn in *Brown v. Maryland*. That is to say, the Court's initial concern in both instances was to determine if the goods claimed immune were actually a part of the "general mass of property in the state", or instead, whether the goods stood apart from the general mass of property in the state in some meaningful way. In *Brown v. Houston*, the Court recognized the crucial fact that the coal involved was, like any ordinary coal, for sale *domestically* and was in no way irrevocably committed to foreign destinations. The fact that the coal was later exported did not distinguish it from domestic coal at the time of the tax levy upon it.

The following year (1886) the Court was presented with a case offering it the first occasion to formulate a rule for measuring precisely when domestic goods were sufficiently segregated from the general mass of property to have achieved immune status as exports, just as *Brown v. Maryland* had presented the need for formulating a similar rule for measuring import immunity. The case was *Coe v. Errol*, 116 U. S. 517. There, Coe and others had cut spruce logs in New Hampshire. These logs had been brought down to the town of Errol, New Hampshire, and placed in Clear stream, and on its banks, to await high waters of spring when they were to be floated down the Androscoggin River to the owner's mill in Maine. The town of Errol levied a tax on the logs which the owners claimed violated the Commerce Clause of the Constitution. Although the case dealt solely with the Commerce Clause, the United States Supreme Court, in holding the logs properly taxed, took the occasion to announce a rule for measuring export immunity as well.

In answering the question when the immunity attached, the Court laid down what we will call the "physical movement" test which it expressed in these terms:

> "There must be a point of time when they [the goods] ceased to be governed exclusively by the domestic law and begin to be governed and protected by the national law of commercial regulation, and that moment seems to us to be a legitimate one for this purpose, in which they commence their final movement for transportation from the state of their origin to that of their destination. * * * Until then it is reasonable to regard them as not only within the state of their origin, but as a part of the general mass of property of that state, subject to its jurisdiction and liable for taxation there. . . ."
>
> (116 U. S. 517 at 525)

And so the "physical movement" test of measuring export immunity for state taxation had its beginning. Of crucial importance to the instant case, however, are the underlying reasons why the Court in *Coe v. Errol* chose to adopt the "physical movement" measure of determining export immunity. Above all, the Court was concerned with fixing a point where it could be said with reasonable assurance that the goods claimed immune were no longer "part of the general mass of property in the state" so as to be treated as any "other property of the same kind is treated." This was the expressed bedrock "hypothesis" of the physical movement measure (116 U. S. at 529) and the Court clearly pointed out *WHY* the rule fixed a proper dividing line. The Court noted that although goods may be "intended" for exportation, until they are put in actual physical motion for their final destination:

> ". . . the owner has a perfect right to change his mind. . . ."
>
> (116 U. S. at 526)

And, in speaking further of determining the immune status of general commodities like wheat, corn, cotton and cattle, under both the Export and Commerce Clauses, the Court also noted:

> "Certainly, so long as these products are on the lands which produced them they are part of the general property of the state. * * * Until launched on its way to another state [or foreign country], or committed to such state [or foreign country], its destination is not fixed and certain. *It may be sold or otherwise disposed of within the state,* and never put in course of transportation out of the state."
>
> (116 U. S. at 528, with emphasis supplied)

The quotations above demonstrate the reasons why the 'physical movement' test was selected in *Coe v. Errol* as a point of determining immunity. To be precise, the Court reasoned that until "physical movement' out of the state commenced, there had been no segregation of the goods from the common mass of property within the state, and, the owner of the goods was not compelled to send them but was still at liberty to dispose of them as he chose to do. In short, until shipment the "certainty" of destination was in substantial doubt.

The reasons for adoption of the "physical movement" test in *Coe v. Errol* provide the key to a correct analysis of all the cases that have later followed it. Although the cases are relatively few, all have involved claims of export immunity for goods which, like the logs in *Coe v. Errol,* were fungible by nature or were so treated by the Court. With several notable exceptions, the "physical movement" rule has functioned adequately enough to mark out the point at which fungible goods become "exports" immune from state taxation. To be certain, neither the respondent here, nor the Supreme Court of Ohio, has had any reason to quarrel with the "physical movement" test as it has been applied in these later cases now to be discussed. In these situations, where either fungible goods or goods that have no obvious domestic use are involved, the "physical movement" test will adequately determine the point of export immunity. Why? Because, as in *Coe v. Errol,* the commencement of

physical transportation or physical delivery to a common carrier both (1) segregates the goods from the general mass of property in the state, and (2) adequately marks the certainty of their foreign destination. Indeed, in the ordinary case involving goods having domestic utility, unless the goods have been shipped toward the foreign destination on tax lien date, or entered with a common carrier, the goods may just as well be sold before then and find a home in the domestic market.

This *diversion potential* has been the most important motivating reason why the physical movement test has been applied to resolve certain cases which have succeeded *Coe v. Errol*. Thus, in *Turpin v. Burgess*, 117 U. S. 504, decided in the same year (1886) but shortly after *Coe v. Errol*, a federal excise tax on tobacco, levied before the manufactured tobacco products left the factory, was challenged on the basis that it violated the immunity against federal tax levies conferred by Article I, §9, Clause 5, of the Constitution. On express authority of the "physical movement" test adopted in *Coe v. Errol*, the Court sustained the tax and, most significantly, noted its concern with the *diversion* potential. The Court stated:

> "In the present case, the tax (if it was a tax) was laid upon the goods before they had left the factory. They were not in course of exportation; *they might never be* exported; whether they would be or not would depend altogether on the will of the manufacturer." [6]
>
> (117 U. S. at 507, with emphasis supplied)

[6] On authority of both *Coe v. Errol* and *Turpin v. Burgess*, a federal tax imposed upon the manufacture of all "filled cheese" was then sustained in 1904. *Cornell v. Coyne*, 192 U. S. 418. The potential of diversion of the cheese to the domestic market was not specifically mentioned in that decision. However, the Court's concern with the fact that the tax was levied on the manufacture of *all* filled cheese, regardless of foreign or domestic destination, indicated a keen awareness of the possibility of diversion potential, i.e., cheese is cheese!

Turpin v. Burgess, however, marked the beginning of difficult problems in the attempt by taxing authorities to force the "physical movement" measure of determining export immunity to fit all cases. Both the weakness and limitation of the rule became quite apparent in *A. G. Spalding Bros v. Edwards*, 262 U. S. 66 (1923). There the Federal War Revenue Act of 1917 had imposed a federal excise tax upon the "sale" of all baseball bats and balls. Spalding was assessed this tax on certain baseball bats and balls which had been ordered from it by a New York agent of a Venezuelan purchaser. Title to the goods apparently passed from Spalding to the Venezuelan purchaser (or its New York agent) at the moment Spalding delivered the goods to the possession of the exporting ocean carrier in New York, and at that precise moment the federal tax was imposed upon the sale. Despite the fact that physical movement had not commenced, the Court unanimously voided the tax on the basis of export immunity. Justice Holmes expressed the Court's reasoning in these words:

> "The transaction, from start to finish, was understood and intended by the plaintiff [Spalding] and Scholtz & Company [purchaser's agent] to be for the purpose of exporting the goods to Delgado & Compania in Venezuela. The question is whether the sale was a step in exportation assuming, as appears to be the fact, that the title passed at the moment when the goods were delivered into the carrier's hands.
>
> * * * *
>
> "To answer it [the question of export immunity] with regard to any transaction we have to fix a point at which, in view of the purpose of the Constitution, the export must be said to begin. As elsewhere in the law, there will be other points very near to it on the other side, so that if the necessity of fixing one definitely is not remembered any

> determination may seem arbitrary. In this case for example, while the goods were in process of manufacture they were nonetheless subject to taxation if they were intended for exports and made with specific reference to foreign wants. (Citations omitted) On the other hand, no one would doubt that they were exempt after they had been loaded upon the vessel for Venezuela and the bill of lading issued. It seems to us that the facts recited are closer to the latter than to the former side, and that the export had begun."
>
> (262 U. S. at 68, 69)

The "~~division~~ diversion potential" of the bats and balls was considered by the Court as a basis for sustaining the tax, but, under all the facts of the case, it was dismissed as a mere theoretical possibility meriting no significance. Justice Holmes stated:

> "Neither does it matter that the title was in Scholtz & Company, and that, theoretically, they might change their mind and retain the balls and bats for their own use. There was not the slightest probability of any such change and it did not occur. The purchase by Scholtz & Company was for the purpose of Delgado & Compania, and for their account and risk. Theoretical possibilities may be left out of account."
>
> (262 U. S. at 70)

The significance of the *A. G. Spalding* case lies in the fact that the Court intentionally chose not to slavishly apply the "physical movement" test, developed in *Coe v. Errol,* as the only means of determining the point of export immunity. With "theoretical possibilities" of diversion being "left out of account", the Court held that physical delivery of the goods to a common carrier could itself mark *another* point of immunity provided the facts of the transaction, in totality, evidenced certainty of exportation.

Twenty-three years after *A. G. Spalding,* even physical

delivery to a common carrier was not demanded when the certainty of export status, at time of the state tax levy, was unequivocably evidenced in other ways. *Richfield Oil Corporation v. State Board of Equalization*, 329 U. S. 66 (1946). In that case, the Court had before it a California oil refiner, Richfield, who challenged California's levy of sales tax upon the gross receipts from the sale of oil Richfield had made to the New Zealand Government. Richfield took the oil by pipeline from its California refinery to its storage tanks at the Los Angeles harbor. Pursuant to prior arrangement, the oil was to be shipped to New Zealand by the "Nucula", a New Zealand tanker. When the Nucula arrived at the port, the oil was pumped into the ship. California, relying upon its understanding of the *A. G. Spalding* case, maintained that export immunity attached only upon physical delivery of the goods to be exported to an independent 'common carrier', and contended that delivery to the purchaser's own vessel was not legally sufficient. With dispatch this Court put an end to the engrafted 'common carrier' rule, insofar as it was argued to be the *sole test* of measuring the point of export immunity, just as it had held in *A. G. Spalding* that 'physical movement' toward the foreign destination was not always a requisite. The Court struck down the California tax holding that export immunity attached to the oil upon delivery to the purchaser's own vessel because that delivery marked a certainty of foreign destination fully equivalent to that of delivery to a common carrier. Once again the Court, as it had done in *A. G. Spalding*, pointed out that, in addition to all the other facts showing a certainty of exportation, *the possibility of diversion of the oil to domestic use was unequivocally negated.* The language of the opinion in this respect is unmistakable:

"The fact that delivery to a common carrier for

export gave the sale immunity in Spalding & Bros. v. Edwards, is seized upon as stating a rule that the process of exportation has not started until such delivery has been made. And cases like Superior Oil Co. v. Mississippi, 28 U. S. 390, 50 S. Ct. 169, are relied upon as indicating that delivery to the purchaser is not sufficient. That case arose under the Commerce Clause. Mississippi was upheld in its effort to tax a distributor or wholesaler who purchased gasoline and later took it to Louisiana for sale. The Court said, p. 395, that although the course of business indicated the likely destination of the oil, it was 'in the hands of the purchaser to do with as it liked, and there was nothing that in any way committed it to sending the oil to Louisiana except its own wishes'. The Court held, therefore, that the tax was not on goods moving in interstate commerce. But it added, p. 396, 'Dramatic circumstances, such as a great universal stream of grain from the State of purchase to a market elsewhere, may affect the legal conclusion by showing the manifest certainty of the destination and exhibiting grounds of policy that are absent here.'

"The certainty that the goods are headed to sea and that the process of exportation has started *may normally be best evidenced by the fact that they have been delivered to a common carrier for that purpose. But the same degree of certainty may exist though no common carrier is involved.* The present case is an excellent illustration. * * *

"[W]hen the oil was pumped into the hold of the vessel, it passed into the control of a foreign purchaser *and there was nothing equivocal in the transaction which created even a probability that the oil would be diverted to domestic use.*"

(329 U. S. at 82, 83, with emphasis supplied)

Most significantly, the Court in *Richfield* concluded its reasoning (329 U. S. at 83) with this statement:

"The means of shipment are unimportant so long as THE CERTAINTY OF THE FOREIGN DESTINATION IS PLAIN."
(Bold print supplied)

Thus, as a result of the *A. G. Spalding* and *Richfield* decisions, it became clear that neither "physical movement" of the goods toward their foreign destination, nor actual delivery of the goods to a "common carrier" was required for export immunity to attach — provided that the "certainty of the foreign destination" of the export commodities was otherwise sufficiently evidenced. This Court has, however, continued to make it understood that the possibility of diverting the goods to the domestic market will be the vital consideration in evaluating that certainty of exportation.[7] Consequently, when goods have an obvious domestic utility, like manufacturing machinery and equipment, or gasoline, are claimed immune from state taxation, only actual physical movement in the course of transportation toward the foreign destination can unequivocally prove the certainty of their export status at the time of the tax levy. Thus, in *Empresa Siderurgica, S. A. v. County of Merced,* 337 U. S. 154 (1949), a case involving the entire machinery, equipment and removable structures of a cement plant which had *operated domestically for many years,* the Court applied the "physical movement" test stating:

". . . It is the entrance of the articles into the export stream that marks the start of the process of expor-

[7] The possibility of diversion of the goods to the domestic market has weighed heavily in state court decisions concerning immunity claims for goods having a domestic utility, like petroleum products, scrap iron and alfalfa pellets. (See cases cited at Petitioner's Brief, pp. 16-20). And compare, *Montrose Chemical Corp. v. County of Los Angeles,* 243 Cal. App. 2d 300, *cert. den.* 404 U. S. 941, where warehoused chemicals awaiting foreign shipment were granted immunity under a showing, *inter alia,* that the chemicals could not legally be marketed within the U. S.

> tation. *Then there is certainty that the goods are headed for their foreign destination and will not be diverted to domestic use. Nothing less will suffice.*" [8]
> (337 U. S. at 157 with emphasis supplied)

Again, in *Joy Oil Company v. State Tax Commission*, 337 U. S. 286 (1949), the Court also emphasized that when export immunity was claimed for a commodity which might well be diverted to the domestic market, only commencement of its actual physical movement toward its foreign destination could fix the point at which immunity attached. Consequently, in *Joy Oil* the ordinary gasoline stored by the Canadian purchaser in Detroit, while awaiting transportation to Canada, was denied export immunity. Mr. Justice Frankfurther stated the basis for the denial in these words:

> "While in storage the gasoline *might have been diverted to domestic markets* without disruption of any existing arrangement for its transshipment and without even breach of any contractual commitment to a foreign purchaser. *Neither the CHARACTER OF THE PROPERTY nor any event equivalent to its redelivery to a common carrier made export certain for all practical purposes.*"
> (329 U. S. at 288, with emphasis and bold print supplied)

The 1949 decision in *Joy Oil Company* was the last time this Court has been called upon to fix any particular event, activity or occurrence which marks the point at

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[8] Although the term 'cement plant' was used as a convenient term of reference for the property claimed immune in *Empresa*, the Record in that case shows the property consisted of numerous items including machinery and equipment, removable structures, parts and supplies, gasoline engines, motors, lathes, et cetera. (See R. 23-25, 30-31; and Exhibit 5 of *A Joint Statement of Facts*, R. 63-76). Also, the dissent of Justice Frankfurther emphasizes the Court's predominant concern with the 'diversion potential' of the property. (337 U. S. at 158-160).

which the constitutional immunity for exports precludes a state from levying its tax. The progression of decisions, however, beginning with *Brown v. Maryland* and continuing through *Joy Oil Company* indelibly mark out the two conditions that must be established before export immunity will attach. These cases, collectively, demonstrate that export immunity attaches to goods at that point in time when:

(1) The goods have been physically segregated from the general mass of property in the country;

— and —

(2) The foreign destination of the goods can be proved a certainty for all practical purposes.

In view of all the cases just discussed, and the motivating reasons for their holdings, the precise questions to be answered in the instant case are these: What physical facts adequately evidence physical segregation of the NCR machines from the general mass of property in Ohio, and also, what facts suffice to prove a certainty of their exportation "for all practical purposes" in order to be immune from the Ohio levy?

III. THE MACHINES OF NCR ARE IMMUNE FROM OHIO'S AD VALOREM PERSONAL PROPERTY TAX, AS EXPORTS, BECAUSE THEY HAVE BEEN CUSTOM MANUFACTURED FOR FOREIGN PURCHASERS, SEGREGATED FROM THE MASS OF GENERAL PROPERTY WITHIN THE STATE BY SPECIAL EXPORT PACKAGING AND WAREHOUSE STORAGE, AND THEIR CERTAINTY OF EXPORTATION IS PROVED BY THE FACT THAT THE MACHINES ARE SO UNIQUE, DUE TO THEIR PHYSICAL CHARACTERISTICS, THAT THEY

CANNOT BE USED DOMESTICALLY OR ECONOMICALLY CONVERTED FOR DOMESTIC USE.

(A) The NCR Machines Were Segregated From The General Mass Of Property In The State

It is undisputed that the machines taxed by Ohio, and claimed immune by NCR, were machines which had been custom produced on foreign orders and, at time of the Ohio tax levy, were specially packaged for export shipment and were stored in NCR's warehouse awaiting ultimate and certain physical movement abroad.[9] It is also undisputed that the machines, unlike domestic counterparts, were not suitable for domestic use because of their special construction and adaptation for use solely in foreign countries. Thus, in every realistic physical sense, the NCR machines were set apart from the general mass of property both in the State and at the NCR plant itself with the export destination marked plainly on their crating. (A. 117) Indeed, it must of necessity be conceded by Ohio that, at a minimum, the machines in question were sufficiently set apart from the general mass of property in the State. And, unlike the general commodities of coal, logs, machinery and gasoline involved in *Brown v. Houston*, *Coe v. Errol*, *Empresa Siderurgica*, and *Joy Oil Company*, there is no possibility of confusing the specially built, specially packaged and warehoused machines of NCR with any domestic machines. Consequently, the first and basic requisite of export immunity has been fulfilled.

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[9] No immunity has been claimed by NCR for machines in the course of manufacture. Until fully assembled, packaged and moved from production lines to the warehouse, the machines are not considered by NCR as sufficiently segregated from other property at the NCR plant.

(B) The Certainty Of Exportation Is Proved By The Character Of The Machines And By The Other Facts Surrounding Their Origin And Disposition.

Just as physical segregation is undisputed, it is further uncontroverted that all the NCR machines, without exception, ultimately join the export stream of continuous shipment abroad to foreign destinations *from which none has ever returned.* (A. 89) Moreover, it is undeniable that all machines taxed owed their very existence to prior foreign orders; were built to serve the precise needs and specifications of the foreign customers; could not be used domestically; and could not economically be converted to a domestic use. All these facts, collectively, evidence a certainty of exportation fully equivalent, if not superior, to the certainty of exportation that might be established by 'delivery to a common carrier', as in *A. G. Spalding,* 'delivery to the foreign purchaser's own vessel', as in *Richfield Oil,* or as demonstrated by the 'physical movement' measure employed in *Empresa Siderurgica* and *Joy Oil Company.*

Admittedly, the NCR machines were not in the hands of a common carrier nor actually in transportation when Ohio's tax intercepted them. This, however, is not important within the context of the instant case because the "diversion potential", ever present in the prior cases dealing with goods having domestic utility, is completely absent here. As was said in *Joy Oil Company* (p. 288) the "character of the property" itself makes exportation a certainty "for all practical purposes". Like the oil in the hold of the foreign ship in *Richfield,* where else but abroad can the NCR machines go? Moreover, it can be said here, with even more assurance than was said by Justice Holmes in *A. G. Spalding Bros.*:

> "The fact that further acts were to be done before the goods would get to sea does not matter *so long as they were only the regular steps to the contemplated result.*"
>
> (262 U. S. 66 at 69, with emphasis supplied)

As further evidence of the certainty of export status of the NCR machines, it cannot be overlooked that the preparation and shipment of these machines abroad is a regular and continuing business practice of the company. It is not a singular occurrence. Instead, the machines form an unending line of shipment abroad. Therefore, this established export practice must also add measurably to the certainty of export of those machines warehoused but awaiting shipment. This Court has spoken directly to this point in *Richfield Oil* (citing *Superior Oil Co. v. Mississippi*, 280 U. S. 390) in these words:

> "Dramatic circumstances, such as a great universal stream of grain from the State of purchase to a market elsewhere, may affect the legal conclusion *by showing the manifest certainty of the destination* and exhibiting grounds of policy that are absent here." [10]
>
> (329 U. S. at 82, with emphasis supplied)

Finally, as this Court has already indicated in assessing tax immunities claimed under the Import-Export Clause, matters of substance and not form must control. Speaking specifically of import immunity in *Hooven & Allison Company v. Evatt*, 324 U. S. 652, 663, the Court held as follows:

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[10] A regular and continuous method of conducting shipments has weighed heavily in determining the immunity of individual shipments claimed both under the Export and Commerce Clauses. See *Carson Petroleum Co. v. Vial*, 279 U. S. 95; *Texas & N. O. R. Co. v. Sabine Tram. Co.*, 227 U. S. 111; and *Hooven & Allison Company v. Evatt*, 324 U. S. 652, 658.

> ". . . [I]n determining the meaning and application of the constitutional provision, we are concerned with matters of substance not of form. When the merchandise is brought from another country to this, the extent of its immunity from state taxation turns on the essential nature of the transaction, considered in the light of the constitutional purpose, and not on the formalities with which the importation is conducted or on the technical procedures by which its is effected."

Just as substance over form has prevailed in assessing claims of import immunity, so too must substance over form prevail in evaluating claims of export immunity. It may well be that when a claim of export immunity is asserted for general commodities having a domestic utility (like logs, oil, gasoline and machinery), nothing less than physical delivery to a carrier or demonstrated physical movement toward the foreign destination, as of the date of tax levy, will adequately segregate the goods from the mass of general property and at the same time sufficiently prove certainty of exportation. With goods of that type, nothing else can suffice because, at any time *before* these events, the distinct possibility of diverting the goods to the domestic market is ever present. However, where, as here, the goods have no domestic utility, because of their physical characteristics, owe their very existence to prior foreign orders and are specially crated and warehoused awaiting certain foreign shipment as part of a continuing business practice, these machines have achieved a "certainty of export" beyond equivocation. To require such machines, as a condition of export immunity, to be physically delivered to a carrier or actually put in physical motion on tax lien date would serve no purpose whatever other than to substitute a matter of form for substance. On the date of the Ohio

tax levy, the certainty of exportation of the NCR warehoused machines was as firmly established and proved as it could ever be. The Supreme Court of Ohio was convinced of this certainty and, we submit, this Honorable Court should also be equally so convinced. Thus, the second and final condition of export immunity has been fulfilled and the NCR machines are entitled to export immunity.

IV. REPLY TO THE BRIEF FOR THE STATE OF OHIO

(A) Ohio's Argument That The NCR Machines Must Be In Motion Toward Their Physical Destinations Is Erroneous. It Confuses A Test For Determining Export Immunity With The Immunity Itself.

The brief for the State of Ohio seems to concede the "certainty of exportation" of the NCR machines. Therefore, instead of dealing with certainty of exportation as a matter of importance, the State bases its argument entirely on what it assumes to be a cast iron proposition of law, *i.e.* that, notwithstanding any other factual circumstances, before goods are entitled to export immunity from state taxation they must have *physically started their journey to foreign destinations.* We respond to that argument by stating that the constitutional concern of Article I, Section 10, Clause 2, is not simply one of protecting from state levies 'goods in motion', or goods 'delivered to a common carrier', or any other particular method of measurement. To the contrary, the constitutional concern is that of protecting "exports" from state taxation and not any particular way by which that export status is evidenced. Therefore, the flaw in Ohio's contention, permeating all its argument, is the miscon-

ception that physical movement of goods toward the foreign destination is itself the constitutional equivalent of export status, as opposed to being only one of the methods by which that export status can be demonstrated.

To be sure, in every case that has come before this Honorable Court, the basic problem has always been to select an event, an activity, or a composite of events or activities, that would fairly establish that point at which the *certainty of export* status could be said to exist. And, because the facts in all prior cases have varied to a marked degree, that point of certainty of exportation has likewise varied. Thus, in *A. G. Spalding Bros.* the physical delivery of the goods to a common carrier was marked as the accepted point of export certainty. And, in *Richfield Oil Company*, in view of all circumstances, the physical act of pumping the oil to the purchaser's own vessel was designated as the point of export certainty. And, in *Coe v. Errol*, *Empresa Sigerurgica* and *Joy Oil Company*, nothing less than actual commencement of physical movement of the goods abroad could suffice to fix the point of export certainty. In all these cases, it is the certainty of exportation that has been the requisite of export status protected by the constitutional immunity, and the measures of that certainty have simply differed as the circumstances have dictated. Contrary to Ohio's understanding, the cases cited above demonstrate that this Court has never pronounced a singular and sole test for measuring the certainty of exportation, nor has it ever confused the *measure* of export immunity *with the immunity itself*, which is what Ohio's argument does.

As a part of its contention that only physical movement towards the foreign destination fixes export im-

munity, the State's brief discusses the relevant cases. But it has dealt with these cases superficially, and without any observable effort to examine why the varied tests of determining certainty of exportation were dictated by the circumstances of these cases. Admittedly, the decisions are pertinent. Not, however, for their *ad hoc* espousal of sterile tests of determining export immunity — like delivery to a carrier or physical movement toward the foreign destination — but instead, for the purposes which these tests were fashioned to serve. As previously discussed in our brief (pp. 18 to 29), these particular tests of determining certainty of export immunity were required for goods and commodities like oil, logs, machinery and gasoline, all of which have a decided potential for domestic use. Until goods of this type are entered for actual shipment with a carrier, or are physically in movement toward their foreign destination, it can never be said with any certainty that:

(1) They are segregated from the common mass of property in the country; or

(2) That they will not be *diverted* to domestic use.

Both of these concerns, however, have been fulfilled in the instant case. The NCR machines have already been *segregated* from domestic goods by special export crating, marking and warehousing, and they cannot be *diverted* to domestic use due to their unique physical characteristics. To simply assert, as Ohio does, that the machines must also be in physical motion toward their foreign destination does not add one iota of "certainty" to their export commitment. In every real sense, these machines, unlike divertible commodities, are just as much exports five minutes before they are physically shipped as they are five minutes after they depart the NCR warehouse aboard a carrier.

Because Ohio's argument insists that physical motion is the *sine qua non* of export immunity, it must be asked

of Ohio why it is that even *after* initial delivery to a common carrier, and even *after* actual commencement of physical movement, this Court has denied export immunity for goods which are "suspiciously" interrupted during their transit? This is precisely what occurred in *Joy Oil Company v. State Tax Commission*, 337 U. S. 286, and within the bounds of Ohio's contentions, there can be no answer to the question posed. Certainly if physical movement is asserted as the equivalent of export immunity and its indispensable requisite, then that immunity must firmly attach at the start of the physical export journey and not fall off or disappear along the way. The true response to the question posed is that "certainty of exportation" is not established by one thing alone, but instead, by an assessment of the "collective facts" surrounding the export process involved.[11] When those collective facts portray segregation of goods from the mass of property in the country, and show a certainty of exportation for all practical purposes, the occasion for asserting export immunity has arrived. This, we submit, is the meaning of the preceding cases before this Court, and the basis upon which the instant case must be resolved. The Supreme Court of Ohio grasped this understanding when it held:

> "Of all the cases examined, we were unable to find any situation where the 'certainty of export' has been more clearly demonstrated than in this case; the degree of certainty here exemplified is fully equivalent to that which attends the delivery of fungible goods to a carrier for the start of a journey to a foreign destination."

[11] In addition to the authorities previously cited, see *Carson Petroleum Co. v. Vial*, 279 U. S. 95, where stored oil, taxed after its initial movement but prior to resumption of movement to its foreign destinations, was held immune because all the facts involved showed the oil was committed abroad. Much like NCR, in *Carson*, the shipper held prior foreign orders for its oil; the oil was produced "especially for export"; the oil was accumulated to make up an entire shipload cargo; there was no possibility of sale at the domestic locations where stored; and shipments of oil abroad was a continuing practice. (279 U. S. at 99, 100 and 109).

(B) Ohio's Argument Of Quid Pro Quo Does Not Bear Analysis.

The brief for Ohio (pp. 20-23) advances a second and special argument in support of its tax upon the NCR machines. It says that Ohio "has given [something] to NCR for which it can ask return." It says that it has provided the benefits and services of government, and schools, and the revenues from Ohio's personal property tax must be used to pay for them. But, what it says, in substance, is that the State *needs the money* and the NCR machines should simply be subjected to tax!

This type of contention, under different guises, has been raised by the taxing authority in virtually every prior case involving a claim of export immunity. In truth, it is not so much an argument as a plea, and whatever broad justification the contention may have, it is as equally valid with respect to goods already in the physical course of exportation through a state, or out of a state, as it is to warehoused goods like NCR's which are awaiting shipment. Most certainly the costs of government, for police and fire protection as examples, are just as onerous for those states and taxing districts all along the way of the journey to the port of actual debarkation abroad, as they are for the state of the goods' origin. Even being mindful that a reconcilation of the competing demands of constitutional immunity and state taxation is in the balance, and must be treated in a practical way, the *quid pro quo* concept suggested by Ohio affords this Court no ascertainable standard whatever of determining the point at which export immunity from ad valorem personal property tax should attach. Does Ohio seriously expect this Court to fashion a point of export immunity based solely on the abstract asser-

tion that Ohio is due something for undefined and unevaluated "services rendered"? [12]

Even conceding a certain broad equity to the State's contention, the State must concede at the same time that because of Ohio's unique method of taxing inventory by the "monthly average" technique, it has *already partially taxed and received revenues from the NCR machines in question.*[13] During the time these machines were nothing more than unassembled *parts*, and during the *course of their manufacture*, the value of those parts, and the "in-process" value of the machines themselves, certainly were subjected to tax by Ohio. Moreover, the export machines in controversy form but an infinitesimal part of the NCR property tax base in the State. A complete review of the total NCR Ohio property for 1968 would show assets in excess of $250,000,000,[14] and the State cannot deny that NCR's total Ohio 'property' taxes alone on these assets runs well in excess of $5,000,000 each year. In addition, NCR is subject to the full range of other taxes imposed upon Ohio manufacturers. Because of these things, NCR has every reason for believing it is a responsible corporate citizen and, as one of the largest taxpayers in Dayton, Ohio, is fully discharging its duty to bear its full share of both state and local governmental expenses.

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[12] The 'A and B' example quoted at page 22 of Ohio's brief claims that the domestic manufacturer bears a disproportionate share of the tax burden when compared to the manufacturer of foreign goods. This is purely an assumption, and without an evaluation of the full range of state taxes borne by both 'A and B', must remain an assumption. At any rate, this type of "discrimination" arises because of the export immunity itself, and *not* because of the measure by which the immunity is determined. The same "discrimination" against domestic goods occurs when immunity is determined upon delivery of the goods to a carrier or upon commencement of their physical journey. In each instance, however, the State's benefits and services to the manufacturer, or to the goods, are the same.

[13] See *Statement of the Case*, and Note (1), *supra*, at p. 5.

[14] See the NCR Balance Sheet included as part of the Ohio Personal Property Tax Return for 1968 (A. 41).

The State of Ohio advances one final contention to buttress its argument of *quid pro quo*. It cites *Northwestern States Portland Cement Co. v. Minnesota*, 358 U. S. 450, and suggests that because this Court has recognized the continuing needs of the states for tax revenue in assessing claims of Commerce Clause immunity, it must do likewise in assessing claims of export immunity. Others have advanced this contention more forcefully, but this Court has consistently rejected it with equal firmness recognizing the patent differences between the strictures of the Commerce Clause and those of the Import-Export Clause. *e.g. Fairbanks v. United States*, 181 U. S. 292; *Richfield Oil Corp. v. State Board of Equalization*, 329 U. S. 69. Generally speaking, it is true of course, that the power of Congress to regulate commerce among the states does not forbid state tax levies upon interstate commercial activities unless those levies discriminate against that commerce, or unduly burden or impede it in a meaningful way. But no *express prohibition* against taxation of this commerce by the states was embodied in the Constitution, and the numerous judicial decisions which have permitted it, in many fashions, have proceeded from an express awareness that in the absence of an express prohibition, and with the overwhelming need for the states to finance their very existence, there was little else to do but make that commerce share a reasonable portion of the cost of local government. Were those at "home" to bear the whole load, while their next door neighbors bought and sold at the same local market tax free?

But the prohibition of the Import-Export Clause is not the same. Unlike the Commerce Clause, it was not meant to be left open to such broad interpretation. It does not merely confer a power upon Congress "to regulate". On

the contrary, it unequivocably prohibits any state, without consent of the Congress, from levying any tax, nondiscriminatory or otherwise, "except what may be absolutely necessary for executing its Inspection laws." [15] By its argument, however, Ohio would choose, through judicial interpretation, to add still *another exception* to the prohibition:

> ". . . and except for any costs of governmental services rendered."

A second difference, vital here, is the decided lack of any demonstrated need for Ohio, or any state for that matter, to defray its cost of government by direct levies of tax on export goods with the attendant risk of impeding the exportation and sale of those goods abroad. For Ohio to simply assert a "need" to finance its existence falls far short of a showing that the need should be satisfied, in part, by the levy of its tax on machines built solely for exportation. Indeed, the instant case, involving tax amounting to $49,872.90, is the *first and only case* to ever come before an Ohio tribunal concerning a claim of export immunity, and very few such cases have come before this Court or any State Courts at any time. The paucity of litigation itself bespeaks the unimportance of this area as a source of local revenues. It is most unlikely, therefore, that any compelling need exists for Ohio to seek tax revenues from export commodities. Despite the temptation, we will not attempt to draw comparisons to, nor weigh in the balance, the vital competing national interest in exportation and export goods that presently exists — except to say that at no

[15] Under its constitutional power to "regulate commerce", Congress may ban or limit state taxation of various interstate business activities, and it has done so on several occasions. No contention can be made, however, that Congress must also act to insure that no state will tax exports.

time in our existence has this national interest been proved to be a more significant one.[16]

There is one final reason why Ohio's *quid pro quo* argument is without merit. Ohio is not confined solely to its personal property tax in making the NCR export machines pay for their asserted "share" of governmental services rendered. This Court has previously marked out some of the alternative ways available. The *net income* from the sale of these export machines may be taxed, *Peck & Company v. Lowe*, 247 U. S. 165, and Ohio does have a corporate tax based in part on income.[17] A state is also free to impose a franchise tax measured in part by the gross receipts arising from export transactions. *Canton Railroad Company v. Rogan*, 340 U. S. 511. And, perhaps, other types of taxes "in lieu of" property tax levied on the export goods themselves might not strike so directly as to afford still another way of recompensing a state. *e.g. Railway Express Agency v. Virginia*, 358 U. S. 434.

We will deal no further here with the State's contention of *quid pro quo*. In summary, it will suffice to say that this contention has been uniformly rejected by this Court on every occasion it has been offered in the past as an inducement to tax what the Constitution expressly forbids. Moreover, the argument cannot assist in the effort to fix a specific point of export immunity, in any case, because it is the immunity itself that occasions any possible existing inequity and not the measure by which

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[16] For expressions of the current economic importance of exports, see the portions of legislative history attending adoption of the "Equal Export Opportunity Act" and "International Economic Policy Act of 1972", Public Law 92-412; 86 Stat. 644, 92nd Cong., 2d Sess. (1972), and extracts from address of Deputy Secretary Kenneth Rush, U. S. Dept. of State, before the President's Conference on Export Expansion at the White House, October 11, 1973, set forth in Appendix D and E, *infra*, pp.

[17] See Chapter 5733, Revised Code of Ohio.

that immunity is determined. In addition, Ohio has already been recompensed to some degree by property taxes on the very NCR machines in question, and it has at its disposal a variety of tax methods for making any export goods bear the share of governmental costs which its Legislature should further consider appropriate.[18]

[18] The Constitution, of course, continues open for amendment. And, within the very terms of the Import-Export Clause, Congress can also "consent" to state taxation of exports if it chooses to do so. These avenues are obviously available for any state to pursue, singularly or in concert.

CONCLUSION

The NCR machines in question were ordered for export. They were designed for export. They were built for export. They are always exported, and they have no domestic use. Thus, at the time Ohio levied its tax upon these machines, both their irrevocable commitment to exportation and their certainty of exportation were established beyond any reasonable doubt.

We submit, therefore, that the Court should affirm the decision of the Ohio tribunal and hold these machines immune from tax. Nothing less will secure to the respondent its constitutionally protected rights, and, at the same time, protect those dominant interests in exportation which underlie the Import-Export Clause of the United States Constitution.

Respectfully submitted,

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APPENDIX A

OHIO REVISED CODE SECTION 5709.01

All real property in this state is subject to taxation, except only such as is expressly exempted therefrom. All personal property located and used in business in this state, and all domestic animals kept in this state and not used in agriculture, except unmanufactured tobacco which shall be exempt from taxation for state purposes to the extent of the value, or amounts, of any unpaid nonrecourse loan or loans thereon granted by the United States government or any agency thereof, are subject to taxation, regardless of the residence of the owners thereof. All ships, vessels, and boats, and all shares and interests therein, defined in section 5701.03 of the Revised Code as personal property and belonging to persons residing in this state, and aircraft belonging to persons residing in this state and not used in business wholly in another state, other than aircraft licensed in accordance with sections 4561.17 to 4561.21, inclusive, of the Revised Code, are subject to taxation. All property mentioned as taxable in this section shall be entered on the general tax list and duplicate of taxable property.

APPENDIX B

OHIO REVISED CODE SECTION 5711.16

A person who purchases, receives, or holds personal property for the purpose of adding to its value by manufacturing, refining, rectifying, or combining different materials with a view of making a gain or profit by so doing is a manufacturer. When such person is required to return a statement of the amount of his personal property used in business, he shall include the average value, estimated as provided in this section, of all articles purchased, received, or otherwise held for the purpose of being used, in whole or in part, in manufacturing, combining, rectifying, or refining, and of all articles which were at any time by him manufactured or changed in any way, either by combining, rectifying, refining, or adding thereto, which he has had on hand during the year ending on the day such property is listed for taxation annually, or the part of such year during which he was engaged in business. He shall separately list finished products not kept or stored at the place of manufacture or at a warehouse in the same county.

The average value of such property shall be ascertained by taking the value of all property subject to be listed on the average basis, owned by such manufacturer on the last business day of each month the manufacturer was engaged in business during the year, adding the monthly values together, and dividing the result by the number of months the manufacturer was engaged in such business during the year. The result shall be the average value to be listed. A manufacturer shall also list all engines and machinery, and tools and implements, of every kind used, or designed to be used, in refining and manufacturing, and owned or used by such manufacturer.

APPENDIX C

Extract of Letter of Mr. Luther Martin to the Convention Regarding Import-Export Clause

"By this same section, every state is also prohibited from laying any imposts, or duties, on imports or exports, without the permission of the general government. It was urged that, as almost all sources of taxation were given to Congress, it would be but reasonable to leave the states the power of bringing revenue into their treasuries by laying a duty on exports, if they should think proper, which might be so light as not to injure or discourage industry, and yet might be productive of considerable revenue; also, that there might be cases in which it would be proper, for the purpose of encouraging manufactures, to lay duties to prohibit the exportation of raw materials, and, even in addition to the duties laid by Congress on imports, for the sake of revenue, to lay a duty to discourage the importation of particular articles into a state, or to enable the manufacturer here to supply us on as good terms as they could be obtained from a foreign market. However, the most we could obtain was, that this power might be exercised by the states with, and only with, the consent of Congress, and subject to its control; and so anxious were they to seize on every shilling of our money for the general government, that they insisted even the little revenue, that might thus arise, should not be appropriated to the use of the respective states where it was collected, but should be paid into the treasury of the United States; and accordingly it is so determined."

Source: Elliot, Debates on the Federal Constitution (Lippincott, 1907), vol. 1, p. 377.

Note: See also *United States v. County of Allegheny*, 322 U .S. 174, quoting argument of Luther Martin, Attorney General of Maryland, in *McCulloch v. Maryland*.

APPENDIX D

Extracts From the Legislative History Attending Enactment of the "Equal Export Opportunity Act" and "International Economic Policy Act of 1972", Public Law 92-412; 86 Stat. 644, 92nd Cong., 2d Sess. (1972)

In Senate Report No. 92-890 accompanying the bill (S. 3726), the need for the legislation was described in part as follows:

> "The Committee believes that Title I of this legislation is needed because the United States is handicapping itself by continuing to control the export of many items which are not of strategic value and are not controlled by our foreign competitors. While it is essential to the national security that the government continue to restrict the export of some items to Communist countries, the Committee believes that restriction of the export of items which can be bought freely from our Western European or Japanese competitors does not benefit the national security. Excessive restrictions result in a worsened balance of payments situation, fewer export sales for American industries, and fewer jobs for American workers. In 1970, the United States share of the World market was 16%, but the U. S. share of the Eastern European market was only 3%. It will be difficult to improve the export performance of United States industries in Eastern

Europe unless unnecessary restrictions which prevent them from competing on an equal footing with foreign competitors are eliminated.

* * * *

"Some of the groups of items which are now subject to unilateral controls that may not be necessary to protect the national interest are chemicals, electrical machinery including machine tools, and certain types of fabrics and materials."

Source: *U. S. Code Congressional and Administrative News*, Vol. 2, pp. 3085, 3086; 92nd Congress, Second Session (1972).

APPENDIX E

Extracts From an Address by Deputy Secretary Kenneth Rush, U.S. Department of State, Before the President's Conference on Export Expansion at the White House, October 11, 1973

"THE DEPARTMENT'S STRENGTHENED EXPORT EXPANSION SERVICES"

* * * *

"We in the State Department share with our business colleagues the basic assumption that economic strength is one of the primary foundations of national power. A sound dollar, a vigorous export trade, and a healthy climate for international investment are prerequisites for the fullest realization of all our foreign policy goals. Without our solid industrial base, our stability, and our competitiveness in world markets, we would never have been able to shoulder the tasks we have undertaken since World War II. Without our great economic strength, the United States simply could not have provided aid to war-ravaged nations, developed collective security arrangements, extended a helping hand to the developing world, and waged two major conflicts.

* * * *

"As I mentioned, we are stressing both program content and the quality of our performance in the commercial field. Foremost among our performance goals has been to involve the entire overseas mission in the task of export promotion. We have instructed our Ambassadors to insure that they have an integrated team

effort. I have personally conveyed this message to all Assistant Secretaries, to all Country Directors, and to every Embassy I have visited, and I have been gratified with the response.

"In our Embassies around the world, we are bringing to bear a team spirit on our export expansion drive. All of the elements of the mission are being harnessed in this effort.

"--We are sensitizing our political and economic reporting officers to be alert to major projects which have export potential.

"--We are obtaining through our AID missions more information about internationally financed projects and technical services which offer opportunities for U. S. business.

"--We are seeking, with the full cooperation of our military attaches, to identify commercial trade lease flowing from military sales.

"--We are publicizing through the United States Information Service our superior technology and the ability of American exporters to satisfy many local development needs.

"The important thing is that today our Ambassadors can integrate overseas activities so that political as well as economic-commercial officers are involved.

* * * *

"Finally, we are trying to insure that the staffing of our management positions properly reflects the priority we are according to our economic and commercial interests. We have designated 28 of our consulates in important commercial centers — 14 of them in Europe — as 'commercial interest posts' to be headed by officers with significant commercial experience. Relatedly we are filling roughly one-fourth of our positions of Deputy Chief of Mission, the Ambassador's second-in-command,

with officers who likewise have significant commercial experience.

* * * *

"Apart from our representational activities, we invite you to avail yourselves of the whole range of export promotion services we perform:

"--We will give you timely notice of export opportunities.

"--We will, with adequate advance warning, provide your representatives with briefings on political and economic trends in the countries they visit and arrange for them to meet foreign buyers.

"--We will provide you with background information on foreign firms.

"--We will provide government-supported exposure of your products in 14 trade center facilities and in U. S. exhibitions.

"--We will identify potential agents, distributors, and licensees for your products.

"I hope that every company throughout the country — large or small — will make use of our strengthened export promotion machinery. All of us in this government are striving to promote the closest possible government-business cooperation in support of U. S. exports. In today's international environment I am confident that partnership will improve our export performance."

Note: Contemporaneously (October 11, 1973) President Nixon announced that he was creating the President's Export Council, an organization of leading American businessmen to advise him on ways to increase U. S. overseas sales. The President's Export Council and the President's Interagency Committee on Export Expansion, working through the Council on International Economic Policy as established by the International Economic Policy Act of 1972, will recommend short-term action to achieve material improvement in the U. S. trade account, long-term programs to achieve equilibrium in the U. S. balance of payments, and action to remove domestic impediments to U. S. exports and improve or supplement existing export incentive.

Source: *Department of State Bulletin*, Vol. LXIX, No. 1793, November 5, 1973.

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IN THE

Supreme Court of the United States

No. 73-629

October Term, 1973

ROBERT J. KOSYDAR,
TAX COMMISSIONER OF OHIO,
Petitioner,

v.

NATIONAL CASH REGISTER COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF OHIO

REPLY BRIEF FOR THE PETITIONER

WILLIAM J. BROWN
Attorney General of Ohio
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INDEX

Page

ARGUMENT:

I. Personal property is not immune from state taxation unless it has started on its journey to a foreign destination 1

II. The constitutional concern that resulted in the Import-Export clause was to protect the goods of one state from Taxation by sister states 4

III. NCR's goods have received benefit from the state of Ohio for which Ohio can ask for something in return 5

CONCLUSION 7

CITATIONS

	Page
CASES:	
Coe v. Errol, 116 U.S. 517 (1886)	2
Cornell v. Coyne, 192 U.S. 418 (1904)	2
Empresa Siderurgica v. County of Merced, 337 U.S. 154 (1949)	2
Shell Oil Company v. State Board of Equalization, 51 Cal. Rptr. 524, 414 P. 2d 820 (1966)	6
MISCELLANEOUS:	
U.S. Dept. Commerce, Social and Economic Statistics Administration, Bureau of the Census, Current Industrial Reports, Preliminary Report, Survey of the Origin of Exports of Manufacturing Establishments in 1971; Series MA-161(71)-1; for release: September 11, 1973	5

[1]See Madison, Debates in the Federal Convention of 1787, 538-541, 573-577, 622-623, 717-718 (Scott ed.; 1839).

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REPLY BRIEF FOR THE PETITIONER

ARGUMENT

I. PERSONAL PROPERTY IS NOT IMMUNE FROM STATE TAXATION UNLESS IT HAS STARTED ON ITS JOURNEY TO A FOREIGN DESTINATION.

The Petitioner, Tax Commissioner of Ohio, again asserts that the exemption from state taxation provided for in the Import-Export Clause of the United States Constitution only attaches to goods which have in fact entered into the export stream. In the case at bar, NCR's goods have not begun movement toward their foreign destination. In other words, they have not entered the

stream of export. As the Supreme Court said in *Cornell v. Coyne*, 192 U.S. 418 (1904):

> "• • • The exemption attaches to the export and not to the article before its exportation. • • •" (192 U.S. 427.)

For this reason NCR's tests for export immunity are not valid and do not apply here. NCR argues that export immunity attaches at that point in time when the goods claimed immune are shown to be (1) segregated and set apart from the mass of general property within the state, and (2) when the certainty of exportation of the goods is demonstrated for all practical purposes. This contention, however, flies in the face of two previous decisions by this Court. In *Empresa Siderurgica v. County of Merced*, 337 U.S. 154 (1949), the Court clearly stated, relying upon *Coe v. Errol*, 116 U.S. 517, that goods do *not* cease to be part of the general mass of property in the state, subject as such to its jurisdiction and taxation in the usual way, until they have been shipped, or entered with a common carrier for transportation to another state or have been started upon such transportation in a continuous route or journey.

Additionally, the certainty of export of goods cannot be demonstrated for practical purposes until actual movement in the stream of export occurs. As noted by this Court in *Empresa, supra:*

> "• • • It is the entrance of the articles into the export stream that marks the start of the process of exportation. Then there is certainty that the goods are headed for their foreign destination and will not be diverted to domestic use. *Nothing less will suffice.*" (337 U.S. 156, 157; emphasis added)

Furthermore, NCR has not met either of these tests, even assuming that the tests are proper ones to be applied in export cases. NCR's goods may be separated from other goods in the sense that they are in NCR's warehouse where

only a certain type of goods are located, but the warehouse and the goods are located in Ohio with the rest of the general mass of property subject to Ohio ad valorem personal property taxation. The goods are still enjoying the benefits conferred upon all goods in Ohio by the government of that state.

There is no certainty of export for NCR's goods. NCR places great reliance upon the fact that these machines have been manufactured pursuant to foreign specifications and thus they could not be sold here domestically. The Tax Commissioner believes that that is still not enough. For example, while these goods are awaiting shipment in the warehouse in Dayton, Ohio, NCR could make the determination that shipping these machines to a specific foreign country *would no longer produce a profit but rather would be economically unprofitable.* In that situation (along with many other situations such as the goods being destroyed by fire, acts of nature, etc.), NCR could very easily make the determination not to export the goods at all. Since the exemption from state taxation only attaches to the export and not at any earlier time or to other types of property, NCR would not be entitled to the export exemption for those particular goods. Under NCR's tests, however, the exemption would still apply. The Tax Commissioner does not believe that this is the result the Court has ever envisioned in any of its past decisions or would like to have occur at the present day.

NCR makes the statement that on the date of the Ohio tax levy, the certainty of exportation of the NCR warehoused machines was as firmly established and proven as it ever could be. The Tax Commissioner responds that the certainty of export was as firmly established and proved as it ever could be, *at least as firmly as could be established until actual movement did occur.* This clearly shows the reason for the test that movement must occur.

The real certainty is when movement actually occurs—not before.

II. THE CONSTITUTIONAL CONCERN THAT RESULTED IN THE IMPORT-EXPORT CLAUSE WAS TO PROTECT THE GOODS OF ONE STATE FROM TAXATION BY SISTER STATES.

The Tax Commissioner takes issue with NCR's claim that the constitutional concern was with protecting from taxation property which was to be exported from the United States to foreign countries. The constitutional intent was not to insure that a state's manufactured goods that were to be exported should be free to compete without a state's imposition of taxation in an international market. The intent, as stated by the Framers of the Constitution, was to insure that one state did not levy import or export taxes against the products of another state and thus discriminate among the states by taxation.[1] In other words, the constitutional intent was not concerned with the international market but rather with a domestic prohibition to the states against taxation.

Moreover, NCR has never shown any proof of the effect that state taxation has on its goods. NCR has never shown if the imposition of Ohio property tax increases the price of its goods or that state taxation has any negative effect on the sale of those goods. There are no facts in the Appendix to show that NCR's goods are less competitive in the international market by the imposition of the Ohio tax. This fact is important since this seems to be the value that underlines NCR's constitutional purpose argument.

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[1]See Madison, *Debates in the Federal Convention of 1787*, 538-541, 573-577, 622-623, 717-718 (Scott ed.; 1839).

III. NCR'S GOODS HAVE RECEIVED BENEFIT FROM THE STATE OF OHIO FOR WHICH OHIO CAN ASK FOR SOMETHING IN RETURN.

Ohio has a very strong interest in the export area. In 1971 Ohio ranked second among all the states in the United States in the value of its exports. Of equal importance is the fact that in 1971 Ohio led the entire nation in employment relating to exports.[2] Consequently Ohio, and states like Ohio, have the difficult problem of maintaining a balance between the necessity for protecting its tax base, the necessity of providing services for all tangible personal property in the state, and the necessity of employing its residents. Ohio, as well as other states who will be obliged to follow the decision of this Court in the instant case, appreciate that the reconciliation of the demands of constitutional immunity in the state's power to tax is an extremely practical matter. The approach that this Court has taken for close to one hundred years that requires actual physical movement before the export exemption attaches is not mechanistic, but is a practical, realistic approach that is easy for tax administrators to administer and also easy for taxpayers to understand. This has been the primary reason for the lack of litigation on this issue. Most manufacturers can understand and appreciate the current test. These reasons should not be given a low priority by this Court.

The test sought by NCR, however, is subjective and the acceptance of such a contention would "lead back to

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[2]U.S. Dept. Commerce, Social and Economic Statistics Administration, Bureau of the Census, Current Industrial Reports, Preliminary Report, Survey of the Origin of Exports of Manufacturing Establishments in 1971; Series MA-161 (71)-1; for release: September 11, 1973.

every forest, mine and factory in the land and create a zone of tax immunity never before imagined."[3]

If it were true that NCR's goods were already exports, then obviously they would not need and would not require any Ohio services. If they were exports, they would have begun some kind of movement either by NCR's own trucks or by interstate common carrier, by storage in the hold of a vessel, or any other means of transportation. Hence Ohio could not ask for anything from NCR. However, in this case it is obvious that the goods in question are not exports because they are still resting in Ohio and they are, in turn, receiving something from Ohio for which the state can ask return. For example, NCR's goods are receiving the protection of Ohio police and fire services. If these did not exist, it may well be true that NCR's goods would not themselves exist when that day came that they began the movement toward exportation and in fact became exports. The services of Ohio make it more certain that these machines will exist in marketable form on the day they become exports and that there will be state and county roads and highways and all those other things that are necessary for NCR to begin the actual movement from Ohio (and immunity from Ohio taxation). Until that point in time they are not exports.

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[3]*Shell Oil Co. v. State Board of Equalization*, 51 Cal. Rptr. 524 (1966).

CONCLUSION

For the reasons stated in the Brief for the Petitioner and herein, the judgment of the Supreme Court of Ohio should be reversed.

Respectfully submitted,

WILLIAM J. BROWN
Attorney General of Ohio

DWIGHT C. PETTAY, JR.
Assistant Attorney General

MARYANN B. GALL
Assistant Attorney General

March 1974

KOSYDAR, TAX COMMISSIONER OF OHIO *v.* NATIONAL CASH REGISTER CO.

CERTIORARI TO THE SUPREME COURT OF OHIO

No. 73-629. Argued March 19, 1974—Decided May 20, 1974

Cash registers and other machines built to foreign buyers' specifications, which were warehoused in Ohio awaiting shipment abroad, title, possession, and control remaining in respondent manufacturer, *held* not immune from state ad valorem tax, since the prospect of eventual exportation, however certain, did not start the process of exportation and move the machines into the export stream, without which the immunity from local taxation conferred by the Import-Export Clause of the Constitution was not available. *Empresa Siderurgica* v. *County of Merced*, 337 U. S. 154. Pp. 65-71.

35 Ohio St. 2d 166, 298 N. E. 2d 559, reversed.

STEWART, J., delivered the opinion for a unanimous Court.

Dwight C. Pettay, Jr., Assistant Attorney General of Ohio, argued the cause for petitioner. With him on the briefs were *William J. Brown*, Attorney General, and *Maryann B. Gall*, Assistant Attorney General.

Roger F. Day argued the cause for respondent. With him on the brief was *Carlton S. Dargusch, Jr.*

MR. JUSTICE STEWART delivered the opinion of the Court.

The Import-Export Clause of the Constitution, Art. I, § 10, cl. 2, provides:

> "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imports, laid by any State on

> Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress."

The issue for decision in this case is whether the assessment of an ad valorem personal property tax by the petitioner Tax Commissioner of Ohio upon certain property of the respondent is in conflict with this Clause.

I

The respondent National Cash Register Co. (NCR) has for many years engaged in the manufacture of cash registers, accounting machines, and electronic data processing systems, which it markets worldwide. Its home offices, main production plant, and warehouse are located in Dayton, Ohio. For marketing purposes, NCR is organized into two divisions, domestic and international, each wholly separated from the other. It is with the operations of the latter division that this case is concerned.

NCR maintains no inventory of machines which are available to meet incoming orders from foreign customers. Rather, when a salesman from the international division receives an order from a customer, an individual order form is completed. The machine is then built to specification, taking into account the commercial peculiarities of the country to which it is to be shipped and the buyer's individual needs.

After manufacture, the machine is inspected, packed, and crated for shipment abroad. The crated machine is then taken to an NCR warehouse in Dayton, to await foreign shipment.[1] The machines relevant to

[1] There is often a time lag between production and final shipment, and an inventory of international machines is therefore built up at the Dayton warehouse. The delays in eventual shipment occur for a

this case were in storage in the Dayton warehouse, awaiting shipment, on December 31, 1967, when the petitioner Tax Commissioner assessed a personal property tax upon them.[2]

NCR appealed the Commissioner's assessment to the Board of Tax Appeals of the Ohio Department of Taxation. Its basic claim was that the "international inventory" in the Dayton warehouse was made up of exports, and thus was immune from state taxation under the Import-Export Clause. In support of this contention, NCR offered evidence to show that, because of their unique construction and special adaptation for foreign use, the crated machines were not salable domestically. Further evidence was offered to show that no piece of equipment built for the international division has ever gone anywhere but into that division; that there is no recorded instance of a machine that was sold to a foreign purchaser being returned; and that no exported item has ever found its way back into the United States market.[3]

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number of reasons. In some cases, recipient countries will not allow partial shipments, so when a large order has been placed and the production cycle is slow, the machines must be consolidated and stored prior to shipment. In the electronic data processing area, the component parts of a shipment are often produced at several different locations, necessitating a consolidation prior to shipment. In other instances, delay in final shipment is caused by difficulties in procuring importation licenses or the uncertainties of the international monetary situation.

[2] Under Ohio Rev. Code Ann. § 5709.01, all personal property located and used in business within the State is subject to an ad valorem tax. Ohio Rev. Code Ann. § 5711.16 provides that articles which have at any time been manufactured are subject to the tax.

[3] A number of factors make domestic sales of the machines impractical. For one thing, the keyboards, printing mechanisms, characters, dispensing mechanisms, and decimal point placement of the machines are geared to the particular monetary system employed

The Board of Tax Appeals nonetheless upheld the Commissioner's assessment. It ruled that even if the crated machines were irrevocably committed to export, the immunity from state taxation conferred by Art. I, § 10, cl. 2, did not attach until the property actually started on its journey to a foreign destination. Since the machines here had not yet entered the export stream, the Board of Tax Appeals concluded that they were still subject to the personal property tax.

The Supreme Court of Ohio reversed this decision by a divided vote. 35 Ohio St. 2d 166, 298 N. E. 2d 559. Relying on the evidence about the domestic nonsalability of the machines, the state court concluded that there was a "certainty of export" in this case. Given that "certainty," the court thought it irrelevant for Import-Export Clause purposes that the taxed machines had not, on the date of the assessment, been moved from the storage facility in Dayton. We granted certiorari, 414 U. S. 1111, because the case seemed to present important questions touching the accommodation of state and federal interests under the Constitution.

II

By its own terms, the prohibition on taxation contained in the Import-Export Clause is absolute; no duties or imposts are allowed "except what may be absolutely necessary for executing [a State's] inspection Laws." [4]

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in the customer's country. Moreover, the machines are quite often designed for use on electrical systems not prevalent in this country. And, even when mechanical problems do not exist, the fact remains that merchandising techniques in this country are considerably more sophisticated than those in many other nations, so as to make machines designed for foreign use somewhat obsolete in the domestic market.

[4] There is no claim that this exception is applicable in any way in the present case.

Consequently, the essential question in cases involving the Clause is a narrow one: is the property upon which a tax has been sought to be imposed an "export," and thus entitled to protection under the provision's literal terms?

The seminal case on the subject is *Coe* v. *Errol*, 116 U. S. 517. *Coe* involved a shipment of spruce logs that had been hewn at various locations in Maine and New Hampshire, and were to be floated down the Androscoggin River for manufacture and sale in Lewiston, Maine. The logs were detained by low water in the town of Errol, New Hampshire, where the local selectmen assessed a number of taxes upon them. The owners of the logs contested the assessments, claiming that the property was immune from taxation under both the Commerce and Import-Export Clauses, since the river served as a "public highway" for the interstate shipment of timber. The Supreme Court of New Hampshire sustained the tax, and this Court affirmed.

Writing for the Court, Mr. Justice Bradley viewed "the precise question for solution" as follows:

> "Do the owner's state of mind in relation to the goods, that is, his intent to export them, and his partial preparation to do so, exempt them from taxation?" *Id.*, at 525.

That question was answered in the negative. Recognizing that its task was to set a "point of time when State jurisdiction over the commodities of commerce begins and ends," *id.*, at 526, the Court concluded that

> "such goods do not cease to be part of the general mass of property in the State, subject, as such, to its jurisdiction, and to taxation in the usual way, *until they have been shipped, or entered with a common carrier for transportation to another State, or have been started upon such transportation in a*

continuous route or journey." *Id.*, at 527 (emphasis added).

Since the logs in *Coe* had not begun a "final movement for transportation from the State of their origin to that of their destination," *id.*, at 525, the Court held that the Constitution provided no immunity from local taxation.

The basic principle of *Coe* v. *Errol* is a simple one—the exemption from taxation in the Import-Export Clause "attaches to the export and not to the article before its exportation." *Cornell* v. *Coyne*, 192 U. S. 418, 427. This Court has adhered to that principle in the almost 90 years since *Coe* was decided, and the essential problem in cases involving the constitutional prohibition against taxation of exports has therefore been to decide whether a sufficient commencement of the process of exportation has occurred so as to immunize the article at issue from state taxation. Of necessity, the inquiry has usually been a factual one. For example, in *A. G. Spalding & Bros.* v. *Edwards*, 262 U. S. 66, this Court decided that delivery of baseballs and bats to an export carrier for shipment to Venezuela constituted a significant "step in exportation," *id.*, at 68, and exempted the goods from a federal revenue tax.[5] Similarly, in *Richfield Oil Corp.* v. *State Board of Equalization*, 329 U. S. 69, it was held that the delivery of oil into the storage tanks of a New Zealand-bound steamer "marked the commencement of the movement of the oil abroad," *id.*, at 83, making the product immune from a California sales tax.

[5] The *Spalding* case arose under Art. I, § 9, cl. 5, of the Constitution, which provides that "No Tax or Duty shall be laid on Articles exported from any State." A long line of cases has recognized, however, that the meaning of "export" is the same under that provision as under the Import-Export Clause. See, *e. g.*, *Brown* v. *Maryland*, 12 Wheat. 419, 445; *Turpin* v. *Burgess*, 117 U. S. 504, 506; *Cornell* v. *Coyne*, 192 U. S. 418, 427–428; *Richfield Oil Corp.* v. *State Board of Equalization*, 329 U. S. 69, 83.

Yet, even if the inquiry in cases like *Spalding* and *Richfield Oil* was specifically directed at determining whether particular acts of movement toward a final destination constituted sufficient entrance into the export stream to invoke the protection of the Import-Export Clause, this Court has never lost sight of one basic principle—at least *some* such entrance is a prerequisite to the Clause's operation. That fact is well illustrated by the opinion of the Court in *Empresa Siderurgica* v. *County of Merced*, 337 U. S. 154. That case involved a California cement plant, which had been sold to a Colombian buyer. Title to the property had passed to the buyer, and a common carrier had begun to dismantle the plant and crate it for shipment to Colombia.

At a stage when 12% of the plant had been shipped out of the country, the county of Merced levied a personal property tax on the remaining 88%. This balance included about 10% of the original plant that had been dismantled and crated or prepared for shipment, but which had not yet begun its voyage to Colombia. This Court held that the tax on the 88%, including this crated portion, did not violate the Import-Export Clause. Adhering to the test of *Coe* v. *Errol*, the Court stated:

> "Under that test it is not enough that there is an intent to export, or a plan which contemplates exportation, or an integrated series of events which will end with it. . . . It is the entrance of the articles into the export stream that marks the start of the process of exportation. Then there is certainty that the goods are headed for their foreign destination and will not be diverted to domestic use. Nothing less will suffice." *Id.*, at 156–157.

Since the 88% of the cement plant had not yet begun its out-of-state journey, the Court concluded that the Cali-

fornia tax was not one upon "exports" within the meaning of the Clause.[6]

We can find little in the case before us to take it outside the ambit of the *Empresa Siderurgica* holding. At the time that the respondent's machines were assessed for taxation, they were sitting in the Dayton warehouse awaiting shipment. Title and possession were in NCR, payment had not yet been made by the putative purchasers, no export license had issued, and the machines were in the complete control of the respondent. More important, there had simply been no movement of the goods—no shipment, and no commencement of the process of exportation. Given this factual setting, it would require a sharp departure from nearly a century of precedents under the Import-Export Clause for us to conclude that the machines were "exports" and exempt from state taxation.

In an effort to avoid the clear holdings of our prior cases, NCR emphasizes the peculiar nature of the taxed machines, and contends that their nonadaptability to domestic use brought about a "certainty of export." Because of this practical absence of "diversion potential,"

[6] In a decision rendered two weeks after *Empresa Siderurgica*, the Court made it clear that not every preliminary movement of goods toward eventual exportation was sufficient to invoke the protection of the Import-Export Clause. In *Joy Oil Co.* v. *State Tax Comm'n*, 337 U. S. 286, the question was whether an ad valorem property tax on gasoline stored in tanks at Dearborn, Michigan, for eventual export to Canada, was permissible under the Clause. The gasoline had previously been purchased by a Canadian corporation, had been certified as purchased for export, shipped by rail to Detroit under bills of lading marked "For Export to Canada," and eventually placed in the Dearborn tanks. The bulk of the gasoline remained in the tanks for over 15 months, because of an apparent shortage of shipping space by water. This Court held that, despite the initial transportation of the gasoline to Dearborn, the hiatus in the journey subjected the property to state taxation.

NCR argues that the ultimate placement of the machines into the stream of exportation is a mere formality, and that this Court should treat the crated property as already having become an export in the constitutional sense even as it sits in the Dayton warehouse.

As a practical matter, it might well be doubted that the "diversion potential" of the crated portions of the cement plant in *Empresa Siderurgica* was any greater than that present here.[7] But, even assuming, *arguendo*, the validity of NCR's arguments about the practical certainty of export here, we think it plain that the warehoused machines are not entitled to the protection of the Import-Export Clause. Mr. Justice Frankfurter put the matter succinctly in *Joy Oil Co.* v. *State Tax Comm'n*, 337 U. S. 286, 288:

> "The Export-Import Clause was meant to confer immunity from local taxation upon property being exported, not to relieve property eventually to be exported from its share of the cost of local services."

We may accept as fact the respondent's assurances that the prospect of eventual exportation here was virtually certain. "But that prospect, no matter how bright, does not start the process of exportation. On the tax date the movement to foreign shores had neither started nor been committed." *Empresa Siderurgica*, 337 U. S., at 157. Given the absence of an entrance of the respond-

[7] Indeed, it might well be contended that in this case: "There is no certainty of export. The record establishes that some machines have remained stored in the warehouse awaiting shipment for three years. The orders could be cancelled, the export license might never issue, the financing may fail to materialize, the machines could be destroyed, dismantled or sold for scrap. These machines were no different from any other mass of goods in a warehouse awaiting shipment." 35 Ohio St. 2d 166, 175, 298 N. E. 2d 559, 564–565 (O'Neill, C. J., dissenting).

ent's machines into the export stream, the immunities of the Import-Export Clause are unavailable.

It may be said that insistence upon an actual movement into the stream of export in the case at hand represents an overly wooden or mechanistic application of the *Coe* doctrine. This is an instance, however, where we believe that simplicity has its virtues. The Court recognized long ago that even if it is not an easy matter to set down a rule determining the moment in time when articles obtain the protection of the Import-Export Clause, "it is highly important, both to the shipper and to the State, that it should be clearly defined so as to avoid all ambiguity or question." *Coe*, 116 U. S., at 526. As Mr. Justice Holmes put the matter in *A. G. Spalding*, 262 U. S., at 69:

> "[W]e have to fix a point at which, in view of the purpose of the Constitution, the export must be said to begin. As elsewhere in the law there will be other points very near to it on the other side, so that if the necessity of fixing one definitely is not remembered any determination may seem arbitrary."

Our prior cases have determined that the protections of the Import-Export Clause are not available until the article at issue begins its physical entry into the stream of exportation. We find no reason to depart from that settled doctrine.

For these reasons, the judgment of the Supreme Court of Ohio is

Reversed.